
(2014) 01 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 82 of 2007

Pedro do Rosario Fernandes	Vs	APPELLANT
Wilfredo Xavier Jose Monteiro		RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Limitation Act, 1963 — Section 27

Citation : (2015) 1 ABR 35

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

Bench : Single Bench

Advocate : J.E. Coelho Pereira, Senior Advocate and Mr. V. Korgaonkar, Advocate for the Appellant; C.A. Coutinho and Mr. Shailesh Redkar, Advocates for the Respondent no. 1, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

F.M. Reis, J.—Heard Shri J.E. Coelho Pereira, learned Senior Counsel appearing for the Appellant and Shri Coutinho, learned Counsel appearing for the Respondent no. 1.

2. The above Appeal came to be admitted by an Order dated 16.07.2010 on the following substantial questions of law:

1. Whether the Lower Appellate Court has misconstrued the provisions of the Limitation Act of Article 58 to the effect that the suit for declaration of title is barred by the law of limitation when there was no claim of adverse possession raised by the Respondents herein ?

2. Whether the findings of the Lower Appellate Court to the effect that the Appellants have failed to identify the suit property are perverse in view of the fact that the contents of Para 1 and 2 of the plaint have not been denied by the Respondents in their written statement ?

3. Whilst dealing with the first substantial question of law, Shri J.E. Coelho

Pereira, learned Senior Counsel appearing for the Appellant, has taken me through the plaint filed by the Appellant wherein it has been clearly stated that the Appellant obtained a certified copy of the survey records in August, 1996 and had filed the suit in May, 1999. Learned Senior Counsel further pointed out that these averments in the plaint have not been disputed by the Respondents in the written statement and, as such, the learned Judge was not justified to pass the impugned Judgment on the ground that the suit filed by the Appellant for declaration of title was barred by limitation. Learned Senior Counsel further pointed out that merely because the survey records were kept for objection, by itself does not mean that the Appellant/owners of the properties have to file a suit for declaration of title within a period of three years therefrom. Learned Senior Counsel has taken me through the impugned Judgment and pointed out that the learned Judge has misconstrued the limitation Act and has erroneously come to the conclusion that the suit was barred by limitation.

4. Shri C.A. Coutinho, learned Counsel appearing for the Respondent no. 1, with that regard has supported the Judgment of the Lower Appellate Court. The learned Counsel has pointed out that once the survey records are admittedly in the name of the Respondents, it was incumbent upon the Appellant to file such suit within a period of three years from the date the survey records came to be promulgated. Learned Counsel further pointed out that the learned Judge has rightly appreciated the evidence on record and has come to the conclusion that the suit was barred by limitation.

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. Shri J.E. Coelho Pereira, learned Senior Counsel appearing for the Appellant, is justified to contend that the averments in the plaint that the Appellant obtained the certified copy of the survey records only in August, 1996 have not been disputed by the Respondents in the written statement. Be that as it may, the suit filed by the Appellant is for declaration of title. Under the provisions of the Limitation Act, specially Section 27 of the Limitation Act of 1963, the right to immoveable properties stands prescribed as per the period provided in the schedule of the said Act. Article 65 and 66 of the Limitation Act, 1963, provides that title to the property is lost only by adverse possession for the specified period. In the present case, the finding of the learned Judge that the suit for declaration of title is barred by limitation, cannot be accepted. The cause of action to file a suit for declaration of title is continuous and, as such, a suit can be filed as long as the title to the property subsists. In the present case, unless and until the Respondents establish that they have become owners by adverse possession, the findings of the learned Judge that the suit is barred by limitation is unsustainable and deserves to be quashed and set aside. The Apex Court in the Judgment reported in *Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others*, , has observed at Para 18 has stated thus:

18. In this view of the matter, we do not find any ground to agree with the

findings of the high Court that the suit was barred by time because of its filing after 18 years of entering into the compromise. The question of filing the suit before the right accrued to them by compromise could not arise until and unless infringement of that right was noticed by one of the parties. The High Court in the impugned Judgment, in our view, had fallen in grave error in holding that the suit was barred by time and had ignored to appreciate that the rights of the appellants to have the revenue record accrued first arose in 1990 when he appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. In our view, the High Court was not justified in holding that mere existence of a wrong entry in the revenue records does not, in law, give rise to a cause of action within the meaning of Article 58 of the Act. No other point was urged before us by the learned counsel for the parties.

Considering the ratio laid down by the Apex Court, merely entering the name in the Survey Records by itself would not give a cause of action to the Appellant/Plaintiff to file a suit for declaration unless his right to enjoy the property has been infringed or at least there is a clear and unequivocal threat to infringe the right of the Appellant/Plaintiff in the suit property. As such, the Lower Appellate Court, was not justified to come to the conclusion that the suit for declaration was barred by limitation taking note of the cause of action as pleaded in the plaint. The first substantial question of law is answered accordingly.

6. With regard to the second substantial question of law, Shri J.E. Coelho Pereira, learned Senior Counsel appearing for the Appellant, has pointed out that on reading of para 1 of the plaint, there are specific averments to the effect that the Appellant is the owner in possession of a specific property having a specific matriz number and a survey number. Learned Senior Counsel has thereafter taken me through the written statements and pointed out that the Respondents have merely denied the said contention and other averments made therein only suggests that the contention of the Respondents was that the Appellant was never in possession of the suit property. Learned Senior Counsel further pointed out that the identity as well as the location of the property has not been disputed by the Respondents and, as such, according to him, the learned Judge was not justified to lose sight of the said aspect whilst coming to the conclusion that the Appellant has not established his right to the suit property. Learned Senior Counsel has taken me through the impugned Judgment and pointed out that though it was specifically averred in the plaint that the Appellant was in possession of the property, the evidence adduced by the Appellant to establish such aspect has been discarded by the learned Judge. Learned Counsel further pointed out that the learned Judge has erroneously discarded the evidence of Pw. 2 and Pw. 3 on such count. Learned Counsel further pointed out that non-consideration of the said admission in the plaint as well as the evidence of the said witnesses has resulted in a perverse findings of fact by the learned Judge to hold that the Appellant has failed to establish his right to the suit property.

7. On the other hand, Shri C.A. Coutinho, learned Counsel appearing for the Respondent no. 1, has disputed that there is any admission as sought to be contended by Shri J.E. Coelho Pereira, learned Senior Counsel appearing for the Appellant. Learned Counsel has taken me through the pleadings in the written statements and pointed out that it is now well settled that the pleadings have to be read as a whole and, according to him, there is a serious dispute raised by the Respondents with that regard to the claim of the Appellant over to the suit property. Learned Counsel further pointed out that there are specific pleadings that the Respondents are disputing the right of the Appellant to the suit property. Learned Counsel further pointed out that the learned Judge has also discarded the evidence of Dw. 2, Dw. 3 and Dw. 4, on the ground that such evidence was beyond the pleadings of the Appellant. The learned Counsel as such submits that the said substantial question of law is to be answered against the Appellant.

8. I have considered the submissions of the learned Counsel as also gone through the records. On perusal of the impugned Judgment, the contention of Shri J.E. Coelho Pereira, learned Senior Counsel that there is an admission by non-traversal in the pleadings has not been examined by the learned Judge whilst passing the impugned Judgment. This would have to be examined by the learned Judge in conjunction with the other evidence adduced by the parties. Having failed to do so, I find that the learned Judge has misconstrued the pleadings of the parties to hold that the Appellant has failed to establish his right to the suit property. It is well settled that a party has to only plead facts and not evidence. In the present case, there is a specific averment by both the parties in the pleadings claiming that they are in possession of the suit property. The evidence adduced by the respective parties on that count cannot be brushed aside on a spacious ground that these averments were not found in the pleadings of the parties. This aspect would have to be examined in the context of the evidence and the pleadings of the parties. In such circumstances, I find that the learned Judge was not justified to discard the evidence of Pw. 2, Pw. 3, Dw. 2, Dw. 3 and Dw. 4 whilst coming to the conclusion that the Appellant has failed to establish his right to the suit property. Having regard to the facts and circumstances of the case and considering that the learned Judge has not examined the matter in accordance with law, I find it appropriate, in the interest of justice, to quash and set aside the impugned Judgment passed by the Lower Appellate Court and direct the learned Judge to decide the Appeal afresh after hearing the parties in accordance with law.

9. Shri C.A. Coutinho, learned Counsel, pointed out that instead of remanding the matter to the lower Appellate Court, the same may be remanded to the learned Trial Court. Learned Counsel further pointed out that the learned Trial Judge has not examined the written statement filed by the Respondents whilst decreeing the suit. Learned Counsel further pointed out that the learned Judge has only relied upon an allotment in the Inventory Proceedings produced by the Appellant without giving any valid reasons nor considering the allotment in favour of the Respondents in the Inventory Proceedings initiated upon the

ancestors of the Respondents.

10. Considering the view taken by me herein above, I find that these aspects can be examined by the Lower Appellate Court upon hearing the parties on its own merits. No doubt, the learned Trial Judge ought to have scrutinised all the material on record whilst coming to the conclusion that the Appellant has established their case. But, however, these aspects can also be gone into by the Lower Appellate Court as it is now well settled that the whole dispute is open before the Lower Appellate Court in a first appeal as it can also re-appreciate the evidence on record. In such circumstances, I find it appropriate to remand the matter to the Lower Appellate Court to decide the Appeal preferred by the Respondents on its own merits in accordance with law.

11. In view of the above, I pass the following:

ORDER

(I) The Appeal is partly allowed.

(II) The impugned Judgment passed by the Lower Appellate Court dated 05.02.2007 is quashed and set aside. Regular Civil Appeal no. 51/2006 is restored to the file of the learned Appellate Court.

(III) The Lower Appellate Court is directed to decide the said Appeal afresh in the light of the observations made herein above in accordance with law.

(IV) All the contentions of both the parties are left open.

(V) Parties are directed to appear before the Lower Appellate Court on 11.04.2014 at 10.00 a.m.

(VI) Appeal stands disposed of.