
(2004) 03 BOM CK 0017

In the Bombay High Court

Case No : Second Appeal No. 239 of 1990

Prabhakar Mahajan, President Sarafa Vyapari Association

APPELLANT

Vs

Satyanarayan Laddha and Others

RESPONDENT

Date of Decision : 17-03-2004

Acts Referred:

Evidence Act, 1872 — Section 83

Citation : (2004) 6 BomCR 813 : (2004) 106 BOMLR 177

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.T. Kharche, J.—This appeal is directed against the judgment and decree dated 25.4.1990 passed by the learned 5th Additional District Judge, Amravati, in Regular Civil Appeal No. 503 of 1986, whereby the appeal came to be dismissed and the judgment and decree passed by the Trial Court on 6.10.1986 dismissing the suit with costs and allowing the counter-claim of defendant No. 2 directing the plaintiff to deliver the vacant possession of the suit site to defendant No. 2 was confirmed.

2. Brief facts are as under :

The appellant original plaintiff filed suit for permanent injunction on the contention that the plaintiff/association is the tenant of Municipal House No, 158(2) situated in Ward No. 44 at Amravati and the said tenement is owned by respondent/defendant No. 1. The respondent/defendant No. 2 contended that he had purchased the whole building including plaintiffs tenement from defendant No. 1, but it was without the knowledge of the plaintiff. The defendant No. 2 started demolishing one of the shops adjacent to the plaintiff tenement and erected the cement concrete pillars adjacent to the eastern wall of the plaintiffs tenement piercing the same in the plaintiffs western wall. The defendant No. 2 was served with the notice dated 1.4.1981 calling upon him to stop the work, but

it was in vain. The defendant No. 3/Municipal Council served the notice dated 18.11.1982 on the contentions that the plaintiff has constructed the eastern wall of his tenement by making encroachment, on 9 feet land situated towards the east of the tenement and directed to demolish the said wall. The plaintiff contended that this notice is illegal and void. The defendant No. 2 threatened the plaintiff that he would demolish the eastern wall without recourse to law. The plaintiff further contended that there was no wall at point AB as shown in the map filed by the defendant and also denied that he demolished the said wall and constructed a new wall by encroaching upon the site owned and possessed by defendant No. 2. It was further contended that the defendants have no locus stand to demolish the said eastern wall and, therefore, the plaintiff was constrained to file suit for permanent injunction.

3. The defendant No. 1 did not contest, the suit, though served. The defendant No. 2 admitted that he is the owner of the house and that the plaintiff is the tenant of Municipal House No. 158(2). He also admitted that he demolished one shop in March, 1981 as the said portion had become dilapidated due to fall of "pipal tree" on it. It was also admitted by defendant No. 2 that he erected R.C.C. pillars just adjacent to the eastern wall of plaintiffs tenement to give support to the girders of the roof of the first and second floor of the building. He contended that he had dug some plinth for the concrete pillars which were beyond the eastern wall of the plaintiffs tenement without in any way taking out the support of the eastern wall. The defendant No. 2 contended that the plaintiff had demolished the bamboo planter eastern wall and constructed a new wall in brick and cement by encroaching on or about 1 feet land towards the eastern side even engulfing the cement concrete pillars of defendant No. 1. He further contended that the newly constructed eastern wall is liable to be demolished and, therefore, he has made a counter-claim for vacant possession of the portion of the land under encroachment with damages amounting to Rs. 500/-.

4. The Trial Court framed the issues and on consideration of the evidence adduced by the parties dismissed the suit, but at the same time decreed the counter-claim put forth by defendant No. 2 and directed the plaintiff to deliver the vacant possession of the suit site wall to defendant No. 2. The plaintiff being aggrieved by this judgment and decree, carried appeal to the District Court. The learned 5th Additional District Judge dismissed the appeal and confirmed the judgment and decree passed by the Trial Court. This judgment is under challenge in this second appeal.

5. The learned Counsel for the appellant contended that the plaintiff erected eastern wall on his own premises and there is no evidence to show that any encroachment has been made. He contended that the counterclaim set up by the defendant No. 2 without disclosing the cause of action is not maintainable. He contended that the counter-claim is bad for want of non-joinder of the parties as the co -owners of the property were not joined as party to the suit. He contended that the concurrent findings recorded by both the Courts below are

not sustainable in law.

6. None appears for respondent No. 1.

7. Mr. Gupte holding for Mr. Deshpande. learned Counsel, for respondent No. 2 contended that the defendant No. 2 has proved that the plaintiff has made encroachment to the extent of one feet land owned by him, which is particularly shown by the letters AB, A. B admeasuring 16 feet as shown in the map and, therefore, the appeal is liable to be dismissed.

8. I have given thoughtful consideration to the contentions canvassed by the learned Counsel for the parties. The Trial Court in the judgment made observations that the plaintiff failed to prove that the newly constructed eastern side wall of his shop is on the same place where the old kud wall was standing. It is apparent and clear that the plaintiff encroached on the land of defendant by constructing new wall by taking inside the pillars of defendant No. 2. D.W. 1 deposed that the plaintiff encroached on the portion shown by letters AB A"B as shown in the map Ex. 83 which is part and parcel of the counter-claim filed by defendant No. 2. The plaintiff had no right to construct the wall on the land of defendant No. 2. It is also clear that he had not constructed the suit wall at the place where the old wall was standing.

9. Whereas the Appellate Court while confirming the findings of the Trial Court, made an observation in para 9 that "though in the plaint it has been pleaded that the plaintiff had not constructed the new wall, but had only repaired the old which was admittedly of "Kud" and "Mud" as mentioned in the appeal memo. The plaintiff has staled in his evidence that prior to Diwali of 1982 the eastern wall had fallen and in order to provide safety, the eastern wall was reconstructed on the same place where the old wall was standing. Thus, it is apparent that the pleadings made by the plaintiff are totally false. In his cross-examination he has also further admitted that the pillars constructed by defendant No. 2 have been taken inside the eastern wall at the time of reconstruction of wall. If really the wall was constructed on the same place, it was not possible to have the pillars inside the wall. It is apparent that the plaintiff with intention to commit encroachment reconstructed the wall and covered the open site between the pillars. As per the map Exh, 83 the encroached portion is about 16 sq. ft. which has not been seriously disputed."

10. It would reveal that both the Courts below placed reliance on the map Exh. 83 while coming to the conclusion that the plaintiff has made encroachment to the extent of 16 sq. ft. The Trial Court did not say a word as to what is the area which is said to be under encroachment of the plaintiff. In such circumstances, the map Exh. 83 which appears to have been signed by the defendant No. 2 for the purpose of putting the counterclaim would not be admissible in evidence.

11. Section 83 of the Indian Evidence Act. 1872 lays down that, the Court shall presume that the maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate:

but maps or plans made for the purpose of any cause must be proved to be accurate.

(emphasis supplied)

12. This Court has taken a view in *Ramchandra Jagtap Vs. Dudharam Langruji Padvekar* dead through L.Rs. Bulkabai Padvekar and Others, that where the maps are made for the purpose of a suit must be proved to be accurate and observed in para No. 8 as under :

The analysis of the aforesaid section would show that the words employed, "but: maps or plans made for the purpose of any cause must be proved to be accurate" would clearly indicate that the maps or plans made for the purpose of any cause must be proved to be accurate and no presumption of law can be drawn that those maps or plans are accurate which are prepared at the instance of the parties for the purpose of the cause. The onus of proving that such a map is accurate lies on the party who produced it. The maps must be proved by the person who has prepared them. They are post litem motes and lack necessary trustworthiness. Where the maps are made for the purpose of a suit there is, even apart from fraud which may exist, a tendency to colour, exaggerate and favour which can only be counteracted by swearing the maker to the truth of his plan. Hence, there is no presumption of accuracy in respect of the map and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. In any case, in which there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference in the pleadings or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case all over again. The map should be drawn with the North at the top and letters marking points should not be put inside ways or upside down.

13. In the present case, the map Exh. 83 has been prepared for the purpose of preferring counter-claim by defendant No. 2 and unless the map is proved to be accurate, it would not be admissible in evidence u/s 83 of the Evidence Act. It is not disputed that the parties did not prefer any application before the Trial Court for appointment of a Commissioner in view of the provisions of Order 26, Rule 9 of the Civil Procedure Code. Unless the local investigations are carried out by the appointment of the City Surveyor as a Commissioner, it is not possible to arrive at a conclusion that the plaintiff has made an encroachment much less to the extent of 16 sq. ft. on the land owned by defendant No. 2. In the circumstances, in absence of the evidence of the Commissioner, this Court is satisfied that this is a fit case which deserves to be remitted to the Trial Court for fresh decision according to law with a further direction to appoint the City Surveyor as a Commissioner, who shall carry out the spot inspection and necessary

measurements and prepare the map after demarcating the boundaries of the property by noting down the actual measurements and shall also prepare the report showing the precise and concise area under encroachment, if any, and then shall submit the report to the Trial Court and the Trial Court shall give opportunity of hearing to parties and consider the evidence along with the map and report of the Commissioner and decide the issue of encroachment on merits. In the result, the appeal is allowed and the judgment and decree passed by both the Courts below are set aside and the suit is remitted to the Trial Court for fresh decision in accordance with law in the light of the observations made above. The Trial Court is directed to decide the matter expeditiously, preferably within six months, after the receipt of record and proceedings. The record and proceedings be sent back immediately to the Trial Court without any delay. Parties are directed to appear before the Trial Court on 6th of April, 2004.