
(2022) 04 BOM CK 0062

In the Bombay High Court

Case No : Second Appeal No. 255 Of 2000, Civil Application No. 1467 Of 2001

Revindra S/O Bhimashankar Dahale And Others

APPELLANT

Vs

Kachardas And Others

RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Limitation Act, 1963 — Article 65
Code Of Civil Procedure, 1908 — Section 100

Citation : (2022) 04 BOM CK 0062

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : N. K. Kakade, C. K. Shinde

Final Decision : Dismissed/Disposed Of

Judgement

Mangesh S. Patil, J

1. This is a second appeal by the original defendant no.1-b from a suit filed by the original plaintiff Kachardas. Respondent Nos.1-A to 1D are his legal representatives. Respondent Nos.2 to 2-E are co-defendants.

2. The second appeal has been admitted by the order dated 29 August 2000 mentioning that Ground nos. (IX) and (X) from the appeal memo would be the substantial questions of law, which read as under :-

"(IX) That, P.W.S. who is Consolidation Officer examined by the plaintiff, he got measured the suit plot on dated 18/08/1990 which is at Exhibit 103/A. He measured the suit plot on the basis of earlier measurement done by the P.W. 4. He stated that, Survey No.121 is towards western side of Survey No.122 and there is boundary mark in between the 2 Survey Numbers. If it is so, then in plaint, this description has not given by the plaintiffs. This witness preferred Exhibit 104 of measurement on the basis of earlier measurement. He admitted that, he has not got measured entire Survey No. 121 and 122. He further admitted that, surrounding CTS No. 2487 to 2490, there were constructed

houses. He further admitted that at the time of measurement, he was unable to ascertain the boundary marks, of Survey Number 121 and 122. If it is so then, whether the measurement done by this witnesses is true and correct, and whether really he made a measurement in respect of encroached area?

(X) That, when this witness, P.W. 5 admitted that, after verifying CTS plan and CTS record (Exhibit 104) in which boundaries are shown on that basis he filed a report of measurement, whether this measurement is admissible in the eye of law ?”

3. In view of the clumsy wordings, I have reformulated the substantial questions and have heard the learned advocates of both the sides on following points:-

(I) Whether the lower appellate court has grossly erred in reaching the conclusions on the basis of the report of the Surveyor who measured the properties that the original defendants made encroachment over the plaintiff's property?

(II) Whether after filing of the suit a city survey had taken place and still without there being any amendment in the plaint, the lower appellate court was legally correct in decreeing the suit with reference to the old survey number?

4. The facts as are necessary leading up to the filing of the second appeal are as under :-

(I) The original plaintiff Kachardas averred that he had purchased a portion admeasuring 4 gunthas from the land survey no.121 totally admeasuring 14 Hector 35 Are of village Shevgaon, Tq. Shevgaon, Dist.Ahmednagar, admeasuring North-South 132 ft. and East-West 33 ft. He then averred that the original defendants entered into possession of a part of the suit property admeasuring South-North 132 ft. and East-West 16.1/2 ft.\ bound by his remaining plot to the East, remaining portion from survey no.121 to the South, Shri Sant Gadge Maharaj Chatralaya to the West and public road to the North. He contended that he had purchased it under the sale deed dated 11 December 1959 and since thereafter he was in exclusive possession of the entire property purchased by him. He averred that about a year and half prior to the filing of the suit the defendants encroached over that portion and erected some construction. He described this 132 ft. by 16.1/2 ft. portion as the suit property and claimed its vacant possession.

(II) The original defendant Bhimashankar, who was the sole defendant and was the predecessor of the appellant and the rest of the respondents, contested the suit by his written statement. He denied about plaintiff having purchased any property from survey no. 121 and he having encroached over the suit property. He denied to have encroached over any property or to have erected illegal construction over the suit property. He also contended that the suit was barred by limitation. Lastly, he contended that the property in his possession was originally purchased by Ashru Abaji Sapkal who himself had carried out

construction over the suit property and he has purchased it from that Ashru Abaji Sapkal along with the construction and he is in legal possession of the suit property.

(III) During pendency of the suit, the original defendant Bhimashankar died and his legal representative's i.e. the appellant and the rest of the respondents herein were brought on record.

(IV) The trial court dismissed the suit in spite of holding that the plaintiff had proved his title to the suit property and the description given by him was correct. It concluded that the plaintiff had failed to prove about the defendant having illegally encroached over the suit property and that the suit was barred by limitation. It also concluded that the defendant was a bona fide purchaser for value without notice.

5. Being aggrieved and dissatisfied by the dismissal of the suit plaintiff Kachardas filed an appeal before the district court, which allowed the appeal, quashed and set aside the judgment and order of the trial court and decreed the suit. Hence this appeal by one of the heirs of the original defendant Bhimashankar.

6. The learned advocate Mr. Kakade for the appellant would vehemently submit that the original plaintiff had miserably failed to prove the description of the property purchased by him and even there being any encroachment. In spite of repeated measurements carried out by different surveyors, the encroachment was not duly proved. The original defendant's property situates in land survey no. 122, whereas, the property purchased by the original plaintiff is from survey no.121. The measurement carried out by the Surveyor R. S. Joshi (PW-4) correctly demonstrated that a road is in existence between these two survey numbers and if that be so, it was in probable for the defendant to have encroached over the suit property. Even that surveyor did not distinctly demonstrate different sub-divisions from survey no. 121, when there is no reference in the plaint about the city survey numbers of the plaintiff's property. Admittedly, a city survey was undertaken and all the properties were allotted city survey number and it was imperative for the plaintiff to have amended the plaint so as to indicate the city survey number of the suit property. Mr. Ramakant Kherkar, the Consolidation Officer (PW-5) specifically admitted this fact while proving the measurement carried out by him as per map (Exh.104). He also submitted that this witness admitted that survey no. 122 is to the east of survey no.121 whereas in the boundaries mentioned in the plaintiff's sale deed, there is no such indication. He would therefore submit that when the evidence was not concrete to demonstrate any encroachment having been made by the original defendant as alleged, the lower appellate court ought to have remanded the matter at the most for undertaking further measurement. In any case, the sound reasons given by the trial court while dismissing the suit have been unnecessarily questioned by the lower appellate court.

7. Per contra, the learned advocate for the LR's of the original plaintiff submits

that there was no dispute about the ownership of the plaintiff over the suit property. The proof that was necessary was in respect of alleged encroachment. The defendant had admitted to be in possession of the property. He had not put up any counter claim. In fact, the trial court had specifically recorded the findings in favour of the plaintiff about he being the owner of the suit property purchased by him and even the description. Once having reached such a conclusion, it was imperative for the trial court to have decreed the suit on such admission itself. Since, it was a suit for possession based on title, the trial court ought not to have dismissed the suit holding it to be time barred, when the original defendant had not taken any plea of having become owner by adverse possession. He would further submits that, once it is concluded that the original plaintiff was the owner of the suit property, it could not have dismiss the suit by holding that the defendant was a bona fide purchaser. When it was a dispute of title, it would not have passed on to the defendant, even if he had purchased the property bona fide. Consequently, gross error was committed by the trial court in appreciating the nature of dispute and non suiting the plaintiff which error has been corrected by the lower appellate court. It concurred with the observations and the conclusions of the trial court about the plaintiff being the owner of the suit property, albeit, erroneously it has replied point no.1 in the negative which is apparent mistake going by the subsequent conclusions drawn by it in the reasoning part.

8. I have carefully considered the rival submission and the papers. Having given a thoughtful consideration, it appears that not only the parties, there learned advocates, but even the courts below seem to have not correctly appreciated the matter in dispute. It seems that everybody has been under a misconception about the nature of the dispute being one for removal of encroachment. It seems that the genesis of this confusion is in use of the word "encroachment" as it is understood in common parlance. Going by the dispute, in fact, it is clearly a case for possession of the suit property on the basis of title. The word encroachment is usually used when a neighbour enters into adjoining property and puts it to his use. This does not seem to be an indeed, it is not a dispute in the matter in hand. It is apparent that the land survey nos. 121 and 122 are adjacent, and though it is admitted that the property purchased by the plaintiff is from survey no.121, whereas the one purchased by the defendant is in survey no. 122 and from the measurement map Exh.104, a road can be seen intervening both these survey nos., 121 lies to the west and 122 lies to the east of this road. It, therefore, appears that going by the factual scenario, what really the plaintiff means to say is about the original defendant being in wrongful possession of the suit property, which is a property nowhere adjacent to defendant's property.

9. In this regard, it is pertinent to note that it has come in evidence that in fact the plaintiff had filed three different suits against three different persons simultaneously, bearing R.C.S. Nos. 172 of 1971, 173 of 1971 and 174 of 1971, alleging about they having forcibly entered into three different portions from the entire piece of land purchased by him from survey no.121 under the sale deed

dated 11 December 1959. All these were similar suits for possession based on title, even though under misconception the word 'encroachment' was taken in a strict sense of an adjoining property holder encroaching upon the property next to his. That is not the case in the matter in hand. The plaintiff has been claiming possession of the suit property which according to him is owned by him, but is in wrongful possession of the defendant. Consequently, this fact needs to be borne in mind while appreciating the matter in controversy, particularly, the stand of the defendant and his heirs and successors.

10. When there is no dispute about the fact that the property purchased by the defendant is from survey no. 122 and the one purchased by the plaintiff is in survey no. 121 and when admittedly a road divides both these properties, it was expected of the defendant to have come out with some strong and convincing evidence as to how he has been in possession of the suit property, which is a piece of land from a different survey number not adjacent to his property from a different survey number.

11. Once this is understood, the matter becomes easy. There was enough evidence before the courts below demonstrating that the suit property is a half portion of the entire property or the plot purchased by the plaintiff from survey no.121. There is also evidence to demonstrate that property was subsequently allotted city survey nos. 2487, 2488, 2489 and 2490. It was also mentioned in that map (Exh. 104) that the defendant was in possession of survey no. 2490. If such was the state of affairs, there was no alternative for the trial court, but to decree the suit, more so having concluded that the plaintiff had proved his title to the suit property and even its description and further having held that the defendant was in possession of the suit property. To this extent, the observations and the conclusions of both the courts below are concurrent. Pertinently, no cross objection was preferred before the lower appellate court on behalf of the original defendant. Once we reach to such a conclusion, the logical consequence as is reached by the lower appellate court is inevitable.

12. The trial court without there being any defence in the written statement about adverse possession and in spite of the provision of the Article 65 of the Limitation Act, since it was a suit for possession based on title, in the absence of plea of adverse possession, the period of limitation would not have began to run recorded grossly erroneous and illegal finding.

13. When it was a dispute pertaining to title, once having reached the conclusion and upheld the title of the plaintiff to the suit property, even the observations and the conclusions of the trial court that the defendant was a bona fide purchaser of the suit property was grossly illegal and unsustainable. All these facts and circumstances have been considered by the lower appellate court while reaching a conclusion that the judgment and order passed by the trial court was grossly illegal and was liable to be quashed and set aside and reversed.

14. Since this is a second appeal, as laid down in the matters of Hero Vinoth

(minor) Vs. Seshammal; (2006) 5 SCC 545, para 19 and Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.; (2009) 5 SCC 264, para 64, the powers of this court to undertake a fresh scrutiny of evidence are very limited and the present matter does not warrant any such exercise. The paragraph Nos. 19 and 64 read as under :-

"19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence."

"64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law.

The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

- (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;
- (ii) The substantial question of law to precisely state such question;
- (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;
- (iv) Another part of the Section is that the appeal shall be heard only on that question."

15. No substantial question of law arises for determination in this second appeal. It is dismissed.

16. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

1. After pronouncement of judgment the learned advocate Mr. Kakade for the appellants prays for extension of interim relief, which has been in operation till date, to enable the appellant to approach the Supreme Court.

2. Other side has objection.

3. Considering the nature of the dispute and fact that the interim relief was in operation till today, the said interim relief to continue for a period of six (6) weeks from today.