

(2013) 10 BOM CK 0193

In the Bombay High Court

Case No : Second Appeal No. 56 of 2002

Saraswati Babuso Chodankar and Others

APPELLANT

Vs

Namdev Babuso Chodankar and Others

RESPONDENT

Date of Decision : 11-10-2013

Acts Referred:

Citation : (2014) 2 ABR 107

Hon'ble Judges : N.H. Patil, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—This Second Appeal was filed by the original defendant Nos. 1 to 4/appellants herein challenging judgment and decree dated 10th June, 2002 passed by the Lower Appellate Court. Respondent No. 1 herein who is the plaintiff, filed a suit for declaration and permanent injunction. The appellants herein are relatives of the original plaintiff/respondent No. 1 herein. The plaintiff contended in the suit that in the village of Guirim, there exists a vast property known as "Collounch" alias "Vancio" belonging to one Pedro Incacio Gonsalves. One residential house, which is situated there was occupied by late Babuso R. Chodankar somewhere in the year 1954 which is surveyed under No. 54-9 and bearing house No. E-102 admeasuring 122 square metres. The said house is referred to as the "suit house." Besides this house, late Babuso Chodankar, the father of plaintiff possessed three paddy fields which were described as under:--

(a) A paddy field known as Kudshet situated at Mapusa and admeasuring about 1809 sq. mts. and surveyed under No. 3/1.

(b) A paddy field known as Annagoli situated at Gurim and surveyed under No. 74/2 & 3 and 75/1 & 3 and admeasuring about 1800 sq. mts.

(c) A paddy field known as "Shelimchem Akhon" survey 48/29 and admeasuring about 11.75 H.A. (hereinafter all three fields are referred as suit fields.)

2. The plaintiff submitted that the original defendant No. 1 widow of late Babuso Chodankar is the mother of the plaintiff and original defendant Nos. 2 and 4 are the brothers of the plaintiff. Original defendant No. 5 is the widow of elder brother of the plaintiff. All the defendants, except defendant No. 5, were staying in the ancestral house occupied by late Babuso. The plaintiff contended that somewhere in the year 1978, Babuso Chodankar filed an application before Mamlatdar of Bardez for declaring him as mundkar of the suit house. During the pendency of the said application, Babuso expired. The said application was contested by original defendant No. 1 with the assistance of defendant No. 2. Original plaintiff started living separately from rest of the defendants due to some trouble in the family. The plaintiff started residing in a small house bearing house No. 55-A adjacent to the main house. The application filed by defendant No. 1 was allowed by the Mamlatdar and defendant No. 1 was registered as a mundkar in respect of the suit house. The plaintiff also filed an application for declaring him as a mundkar in respect of the house bearing No. 55A which was dismissed by Mamlatdar. Appeal filed against the said order is still pending before Additional Collector, Panaji.

3. The plaintiff submits that the landlord in collusion with defendant Nos. 1 and 2 filed a Civil Suit bearing No. 397/1989 in Mapusa Court to restrain the plaintiff and defendant No. 1 from carrying out any construction. Injunction which was granted, was confirmed by order dated 15th March, 1990. The plaintiff specifically claimed that he has 1/5th share in the suit house and in all the three suit fields. Defendant Nos. 1 to 4 filed joint Written Statement. The defendants contended that the portion of old house was substantially demolished long back and thereafter defendant No. 2 constructed a new house. The portion of old house was still occupied by defendant No. 4. This portion adjoins the house of plaintiff bearing house No. 55A. It was contended that the paddy field at Mapusa was leased out by Comunidade to defendant Nos. 1, 2 and 4, who are the exclusive tenants of the said properties. In the year 1987, defendant No. 2 filed an application before Joint Mamlatdar of Bardez for registering him as a mundkar of the said house. Subsequently, by order dated 17th February, 1988, the joint Mamlatdar allowed the application. In respect of house bearing No. 55A, the Joint Mamlatdar of Bardez ordered that the plaintiff be registered as mundkar in respect of the said house.

4. The trial Court, after recording the evidence, and considering the submissions advanced, by a judgment and decree dated 3rd March, 2000, dismissed the Regular Civil Suit No. 131/1990/Ist Addl.

5. The plaintiff preferred an Appeal. By a judgment and order dated 10th June, 2002, the Lower Appellate Court allowed the Regular Civil Appeal No. 72/2000 holding that the plaintiff shall have right to the suit house and the suit fields to the extent of 1/6th share in favour of the plaintiff. The learned counsel for the appellants submitted that the Lower Appellate Court fell in error in allowing the appeal in respect of mundkarial rights of the parents of the contesting parties i.e.

plaintiff and defendants. It was submitted that the plaintiff alone cannot claim any specific right in the property of parents held by them as mundkars or tenants of the suit house and in respect of the field. Determination of the shares of the plaintiff by the Lower Appellate Court as owner of the property, is against the provisions of mundkarial law and that of tenancy law. In other words, learned counsel submitted that unless purchase certificate is issued in favour of the parents, the plaintiff was not entitled to seek declaratory rights as owners in the mundkarial property or tenanted property. The learned counsel has referred to both the judgments of the Courts below, the evidence of the parties and other relevant records. Learned counsel submitted that substantial questions of law were rightly framed by this Court and which needs consideration.

6. The learned counsel for the respondents submitted that as parents of the plaintiff had rightful claim in respect of the suit property as mundkars and tenants, the plaintiff had rightly approached the Court for getting his share in the suit property determined and for seeking a declaration. The Lower Appellate Court considered these issues and reached appropriate conclusions while decreeing the suit of the plaintiff. The learned Counsel submitted that there is no dispute in the proposition that the plaintiff would be entitled to share in the suit property on the basis of right of inheritance and consequent to the determination of the claim of the parents of the plaintiff as mundkars and tenants of the suit property. The learned Counsel submitted that in respect of the plea raised by the plaintiff regarding share in the property, the defendants have not led any evidence to establish their case contrary to the evidence led by the plaintiff.

7. I have perused the record placed before me, pleading of the parties and the judgment and order passed by the Courts below.

8. The record reveals that the father of the plaintiff filed appropriate application claiming right in respect of the suit house as mundkars but during the pendency of the said proceedings, the father died. The parents of the plaintiff had resorted to appropriate proceedings in respect of their claim as mundkars and tenants of the respective suit property. In the facts of the case, the plaintiff and the contesting defendants would be entitled to claim share in the suit property based on accrual of right in favour of their parents. Whatever share the parents of the plaintiff and contesting defendants would get under law as mundkar and as tenant, the plaintiff and the contesting defendants would get by way of law of inheritance.

9. In respect of the issue of 1/5th share which was determined by the Lower Appellate Court in favour of the plaintiff, I do not find any contrary material on record to reject the contention of the plaintiff and set aside the finding of the Lower Appellate Court.

10. Consideration of this appeal on merits now is limited to a narrow compass. While decreeing the suit, the Lower Appellate Court passed following order:--

Appeal is hereby allowed. Impugned Judgment and decree dismissing the suit is

set aside. Suit decreed holding that the plaintiff shall have right to the suit house and the suit fields to the extent of 1/6th share in favour of the plaintiff. Parties to bear cost of the appeal.

11. The learned counsel appearing for the appellants submitted that to avoid further complications and confusions in respect of interpretation of the order passed by Lower Appellate Court, some clarification is necessary.

12. Keeping the substantive order passed by Lower Appellate Court intact, I find that the order requires to be clarified so as to avoid future confusion and complication in respect of the interpretation of the order. The plaintiff shall have right to the suit house and suit field to the extent of 1/5th share in accordance with the right of law of inheritance based on the claim put forth by the parents of the plaintiff as mundkars and as tenants in respect of suit property. With this clarification, the decree of the Lower Appellate Court is confirmed. Appeal stands disposed off.