

(2011) 07 BOM CK 0200
In the Bombay High Court
Case No : S.A. No. 534 of 2011

Shankar Appa Mali since deceased by his Heirs Sidram
Shankar Mali and others

APPELLANT

Vs

Ananda Mahadeo Mali and others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Consolidation Act, 1948 — Section 31A, 36A

Citation : (2011) 5 MhLj 727

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : V.B. Rajure, for the Appellant;

Judgement

V.M. Kanade, J.—Heard the learned counsel appearing on behalf of the appellants. None appears on behalf of the respondents, though they were served.

2. The Second Appeal was admitted by this Court on substantial questions of law, which are framed at Serial Nos. 2, 3 and 5 read as under :

(2) The substantial question of law involved in this Second Appeal is that whether the learned Judge of the Appellate Court acted in accordance with the provisions of law in framing different issues than that of the trial Court and answered it correctly without any opportunity to lead evidence on the said issue.

(3) Further question of law is that whether it was necessary to review and the matter to the trial Court to answer the issue framed by the appellate Court or was it necessary to call for the finding on the said issue from the trial Court.

(5) Another question of law is that the reliance placed on the documents produced in appeal without considering whether any appeal is produced or not treating it as final is legal.

3. The learned counsel appearing on behalf of the appellants has submitted that additional substantial questions of law may be framed as grounds Nos. 1, 2 and

3, which are as under :

(1) The substantial question of law involved in this Second Appeal is that whether the learned Judge of the Appellate Court acted in accordance with the provisions of law in framing different issues than that of the trial Court and answered it correctly without any opportunity to lead evidence on the said issue.

(2) Further question of law is that whether it was necessary to remand the matter to the trial Court to answer the issue framed by the Appellate Court or was it necessary to call for the finding on the said issue from the trial Court.

(3) Another question of law is that the reliance placed on the documents produced in appeal without considering whether any appeal is pending or not treating it as final is legal.

4. Brief facts are as under :

The appellants are the original plaintiffs and the respondents are the original defendants (for the sake of convenience, the parties shall be referred to as "the plaintiffs and the defendants").

The dispute between the parties pertains to an area admeasuring 8 acres and 11 gunthas situated at Village Erandoli out of Gat No. 372. According to the plaintiffs, there was a partition between the plaintiffs and defendants in the year 1964 and the plaintiffs given possession of 8 acres and 11 gunthas in Gat No. 372 and the defendants were given possession of 5 acres, 35 gunthas from Gat No. 374. Pursuant to the implementation of the Consolidation Act, the lands in the said village were accordingly divided in various Gat nos. and the consolidation scheme was finalized and the possession of the plaintiffs in respect of the said area of 8 acres and 11 gunthas for Gat No. 372 was finalized. The Plaintiffs filed a suit on 12-6-1974. In which, it was alleged that the defendants unauthorizedly was trying to obstruct their possession in respect of the said land and, therefore, they prayed for permanent injunction and alternatively for possession of the suit land.

5. The defendants, in their written statement had contended that the consolidation scheme was not properly finalized since no statement was recorded in the consolidation scheme and as a result, the Plaintiffs had managed to obtain an entry in their names in respect of the said land. The defendant No. 1 challenged the consolidation scheme by filing an appeal u/s 31A before the Deputy Director of Land Records seeking correction of the said entry. In the meantime, the trial Court decreed the suit by its judgment and order dated 3-11-1981 and restrained the defendants from interfering or obstructing the peaceful possession of the plaintiffs in respect of the suit land. Being aggrieved by the judgment and order, the defendants filed an appeal before the District Court. The District Court came to the conclusion that the trial Court had erred in deciding the suit on the basis of the consolidation scheme since the said order was challenged and a final order was not passed by the competent authority and,

therefore, the appeal was allowed and the order passed by the trial Court was set aside.

6. Being aggrieved by the said order, the appellants have filed this Second Appeal which has been admitted.

7. The learned counsel appearing on behalf of the appellants submitted that during the pendency of this Second Appeal, the dispute which was pending before the competent authority under the Consolidation Act has now been finally decided and the order passed by the Settlement Commissioner had been confirmed upto the High Court. He submitted that the Settlement Commissioner in his order had referred to the inquiry which was made while preparing the consolidation scheme. The Settlement Commissioner had observed that the measurement of sub-divisions in possession of the parties which was carried out by the Surveyor and a map of the holdings of both parties was prepared. This measurement showed that the holding of the plaintiffs was 8 acres and 11 gunthas and the holding of the defendants was 5 acres and 35 gunthas and, accordingly, entries of the area of the pot hissas of the parties was taken in the "Gunakar Book" which is a register gives details of pot hissas of a particular Survey Number, the area of each pot hissa and the name of the holder and, accordingly the names of the parties were entered in the statement prepared under Rule 9 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Rules, 1959. The particulars of area of the holdings of both parties were finally reflected in the sanctioned consolidation scheme and the new record of rights prepared by the Consolidation Officers. In the revision application which was filed by the defendant No. 1, the Additional Chief Secretary and Officer on Special Duty (Appeals) has again taken into consideration all the facts and circumstances of the case in his detailed order dated 5th June, 1995 and the order of the Settlement Commissioner was confirmed and the revision filed by the defendant No. 1 was dismissed. The Writ Petition filed by the defendant No. 1 in this Court was also dismissed by the Division Bench in Writ Petition No. 2697 of 1996 dated 15th September, 2006.

8. The controversy, therefore, regarding the entries made in the consolidation scheme has been finalized and confirmed by virtue of the judgment and order passed by this Court.

9. Though section 36A imposes a bar on the jurisdiction of the Civil Court, the said bar is only restricted to orders which are passed by the Consolidation Officers. A suit, therefore, for a declaration and injunction on the basis of an entry made by the Consolidation Officers is not barred u/s 36A.

10. Since the possession of the Plaintiffs has now been confirmed by virtue of confirmation of the entries made in the consolidation scheme, the Plaintiffs would be entitled to seek an order of injunction as prayed for by him.

11. The Appellate Court has not properly framed the point for determination, as were framed by the trial Court and has framed only one point as follows.

Whether the Plaintiff proves that the area of Gat No. 372 is 8 acres and 11 gunthas?

The said issue had not been raised either by the plaintiffs or by the defendants. The plaintiffs' case was that in view of the consolidation scheme which was finalized they were shown to be in possession of 8 acres and 11 gunthas in Gat No. 372 and on the said basis they had claimed injunction. The Lower Appellate Court without allowing the parties to lead evidence, has taken into consideration whether the entry which was made by the Consolidation Officers was correct or not? By independently taking into consideration the partition deed and the change made by the Consolidation Officers, the Appellate Court could not have decided the correctness of the entries made by the Consolidation Officers in view of the provisions of section 36A, nor could have given a finding in favour of the defendants without permitting the plaintiffs to lead evidence on the new point which was framed for consideration by the appellants. Substantial question of law framed at ground No. 2, accordingly, is answered in the negative. So far as other questions are concerned, the said questions do not survive since the consolidation scheme has been finally approved by this Court by its judgment and order dated 15th September, 2006 in Writ Petition No. 2697 of 1996. Second Appeal is, accordingly, allowed. The judgment and order passed by the Lower Appellate Court is set aside and the judgment and decree passed by the trial Court is confirmed.

Second Appeal is disposed of.