

(2011) 10 BOM CK 0068
In the Bombay High Court
Case No : Second Appeal No. 1 of 1998

Shri Balkrishna Rama Kanekar (since deceased) through Shri
Sadashiv B. Kanekar (since deceased) Smt. Shobha Sadashiv
Kanekar and Others

APPELLANT

Vs

Barkilo Gharo Saunto (deceased) heirs not brought on
record. And Chandrakant Krishna Saunto (since deceased)
through LR's Smt. Rajani Chandrakant Sawant and Others

RESPONDENT

Date of Decision : 03-10-2011

Acts Referred:

Citation : (2011) 10 BOM CK 0068

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

Bench : Single Bench

Advocate : Sudin M.S. Usgaonkar, for the Appellant; R.G. Ramani, for the
Respondent

Final Decision : Allowed

Judgement

F.M. Reis, J.—Heard Shri Sudin M.S. Usgaonkar, Learned Counsel appearing for the appellants and Shri R.G. Ramani, Learned Counsel appearing for the respondents.

2. The above second appeal was admitted on the following substantial questions of law:

(A) Whether the Appellate Court erred in drawing inference against the Appellant for not having furnished sketch of the property claimed by the Appellant in view of the amendment of the C.P.C. Enforced in 1987 when admittedly the suit was filed much prior in 1978 and whether such a sketch was essential to decide the issue involved in the suit.

(B) Whether the Appellate Court erred in not looking into the survey form I and XIV of the property which was duly corrected in pursuance of the order of Awal Karkoon although the plan was not corrected.

(D) Whether the Courts below erred in not considering the order of the Deputy Collector PW-1/C wrongly holding that it was not decided on merits not realizing that the said judgment being of affirmance, and not of reversal, had confirmed the order of Trial Court.

3. Shri Sudin Usgaonkar, Learned Counsel appearing for the appellants has assailed the impugned judgment and pointed out that the Courts below have erroneously come to the conclusion that the appellants have failed to identify the disputed portion of the property on the basis of the plans produced on record. The Learned Counsel has taken me through the plaint filed by the appellants and pointed out that at paras 18 and 19 of the plaint there was a specific averment to the effect that the disputed portion was in between wall A and the hill which is located towards the northern side of the property surveyed under No.91/1. The Learned Counsel further pointed out that whilst dealing with the said paras in the written statement the only dispute raised by the respondents was to the effect that the disputed portion forms part and parcel of the property belonging to the respondents. The Learned Counsel further submitted that the location of the disputed portion was not at all in issue as can be considered from the pleadings of the parties. The Learned Counsel has taken me through the judgment of the trial Court and pointed out that the learned Judge has given a finding to the effect that the respondents are in possession of the surveyed portion without appreciating the evidence on record nor considering the evidence adduced by the parties on that count. The Learned Counsel further pointed out that the finding of the trial Court is by misreading the document at Exhibit AW1/D which discloses that the survey records have been promulgated in favour of the appellants when the learned Judge has misread the document to hold that the survey record are not in favour of the appellants. The Learned Counsel has also taken me through the judgment of the Appellate Court and pointed out that the learned Judge has rejected the appeal on the ground that the disputed portion has not been identified. The Learned Counsel has also pointed out that the learned Judge has misread the document of the adjoining owner at Exhibit PW1/B as well as the document at PW1/A which establishes that the northern boundary of the property of the appellants is the hill which itself goes to show that the disputed portion forms part and parcel of the property of the appellants. Learned Counsel further pointed out that the Courts below have not given any categorical finding on the basis of appreciating the evidence on record to the effect that the respondents are in possession of any portion of the disputed area. The Learned Counsel, as such, submitted that the impugned judgment cannot be sustained and deserves to be quashed and set aside.

4. On the other hand, Shri R.G. Ramani, Learned Counsel appearing for the respondents has supported the impugned judgment. The Learned Counsel has pointed out that the appellants have failed to establish the identity of the disputed portions and, as such, both the Courts have concurrently held that the appellants have failed to establish the extent of the encroached area claimed by them. The Learned Counsel further pointed out that there are concurrent findings

of fact arrived at by the Courts below to the effect that the respondents are in possession of the disputed portion of the property. Learned Counsel further submitted that the evidence on record conclusively establishes that the respondents are in possession of the disputed portion of the property and, as such, the question of granting any relief in favour of the appellants would not arise. Learned Counsel has taken me through the pleadings of the parties including the plaint and written statement and pointed out that there was a dispute raised with regard to the identity of the property and, as such, the appellants have failed to establish such encroachment over the disputed area and as such the appellants are not entitled for any relief as sought for in the plaint. Learned Counsel, as such, submitted that the appeal deserves to be rejected.

5. Having heard the Learned Counsel and on perusal of the record, I find that at paras 18 and 19 of the plaint there was a categorical statement made to the effect that the disputed portion of the property was towards the northern side of the fencing of the property surveyed under no.91/1 which extends up to the hill located on the northern side. In the written statement filed by the respondents the identity of the said property has not been disputed as such. Apart from that it is not the case of the respondents that the northern boundary of the preexisting survey no.91 is the hill as shown in the Land Registration Document of the appellants at Exhibit PW1/A. As such, the Courts below are not justified to come to the conclusion that the location of the disputed portion of the property has not been established. The respondents were very well aware about the location of the disputed portion and their only contention was that the disputed portion was part and parcel of the property of the respondents. On the other hand, the contention of the appellants was that the disputed portion was forming part and parcel of the property of the appellants. The Courts below rejected the claim of the appellants essentially on the ground that the identity of the disputed portion has not been established. Such finding cannot be accepted in view of the pleadings of the parties as well as the evidence on record. Apart from that, it is not disputed that during the pendency of the above proceedings in the Courts below, the property under Survey No.91/1 has been promulgated and the area mentioned therein discloses an area of 81525 square metres. As the survey records have been promulgated a presumption u/s 105 of the Land Revenue Code is available in favour of the appellants. The learned trial Judge has misread the promulgated survey records at Exhibit PW1/D to come to the conclusion that such survey entries do not stand in the name of the appellants. On the other hand, on plain reading of survey record at Exhibit PW1/D, the document which is at page 78 of the paper book, the names of the appellants are clearly shown in such records. As such, the Court below has committed an error to come to the conclusion that the survey records do not stand in the name of the appellants.

6. Considering that the suit filed by the appellants was for injunction simpliciter, the main aspect to be considered is as to who is in possession of the suit property. There were rival claims put forward by the parties to such contention. On perusal of the judgment of the trial Court, I find no appreciation of the

evidence by the trial Court whilst coming to the conclusion that the respondents are in possession of the disputed portion. The Appellate Court has also failed to consider this aspect of the matter. In suits filed for injunction simpliciter there has to be scrutiny of the evidence adduced by the parties to ascertain as to who is in possession of the disputed portion. As no such scrutiny has been done by the lower Appellate Court, and in the interest of justice, it would be appropriate that the lower Appellate Court be directed to decide the appeal preferred by the appellants after hearing both the parties in accordance with law.

7. As such, it is held that merely non-production of sketch disclosing the encroached area would not affect the claim of the appellants establishing that the appellants are entitled to the disputed portion on the basis of evidence on record. The Courts below have committed an error in not taking into consideration the duly promulgated survey records as well as the order of the Deputy Collector at Exhibit PW1/C which stands in the name of the appellants whilst disposing of the appeal preferred by the appellants. Non consideration of the said document has vitiated the impugned judgment of the Lower Appellate Court. The substantial questions of law are answered accordingly.

8. In view of the above, I pass the following order:

ORDER

(i) The appeal is partly allowed.

(ii) The impugned judgment and decree dated 24/06/1997 passed by the lower Appellate Court is quashed and set aside.

(iii) Regular Civil Appeal No.16/1989 is restored to the file of the learned District Judge, Panaji.

(iv) The learned District Judge is directed to decide the appeal afresh after hearing both the parties in accordance with law.

(v) All contentions of the parties with regard to their respective claim over the disputed portion are left open.

(vi) The appeal stands disposed of accordingly with no order as to costs.

(vii) The parties are directed to appear before the learned District Judge on 14/11/2011 at 10.00 a.m.