

(2011) 01 BOM CK 0065

In the Bombay High Court

Case No : Second Appeal No. 85 of 2000

Shri Mahadev Sajro Shet Talpy, (Manohar Mahadev Talpy Son
of deceased and Others) and Others

APPELLANT

Vs

Shri Babaji Sagun Talpy (Sundare Babaji Talpy, Wife and
Others), Shri Ladko Gopal Talpy (since deceased)
represented by his legal heirs (Mrs. Mogru Ladko Talpy and
Others) and Shri Shankar Gopal Talpy (Chandra S. Talpy and
Others)

RESPONDENT

Date of Decision : 12-01-2011

Acts Referred:

Citation : (2011) 113 BOMLR 352

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

**Advocate : S.D. Lotlikar and Xettigar, for the Appellant; A. Kansar, for the
Respondent**

Judgement

A.P. Lavande, J.—Heard Mr. Lotlikar, learned Senior Counsel for the Appellants and Mr. Kansar, learned Counsel for the Respondents.

2. By this Second Appeal, the Appellants take exception to the judgment and decree dated 6th June, 2000 passed by the Additional District judge, Panaji in Regular Civil Appeal No. 66/1992 dismissing the appeal filed by the Appellants against the judgment and decree dated 30th September, 1992 passed by the Civil Judge, Junior Division Sattari at Valpoi dismissing the suit bearing No. 20/1990 filed by the Appellants.

3. The Appellants who are the Plaintiffs in the above suit, filed the above suit seeking declaration that the names of the Defendants were wrongly recorded in record of rights in respect of the suit property bearing survey No. 9/1 of Velguem of Sattari Taluka. The Plaintiffs also sought permanent injunction against the Defendants. The Defendants contested the suit filed by the Plaintiffs.

4. In the course of the trial, the Plaintiffs led oral as well as documentary

evidence. Indisputably, number of documents were relied upon by the Plaintiffs. Similarly, the Defendants also led oral evidence and also relied upon number of documents in support of their case. The trial Court by the judgment and decree dated 30th September, 1992 dismissed the suit. The lower appellate Court by the impugned judgment and decree dismissed the appeal preferred by the Plaintiffs.

5. The appeal was admitted on the following substantial questions of law:

(A) In view of the specific case set up by the Respondents that the Plaintiffs could not acquire any right to the suit property, by virtue of "potto" dated 26th April 1857 as the same was already granted to their great-grandfather by an earlier grant dated 28th November, 1846, it was exclusively the burden of the Respondents to establish this position in order to defeat the claim of the Appellants to being title holders in respect of the suit property;

(B) In the absence of any indication in the documents produced by the Respondents that they pertained to the suit property, the conclusion drawn by the learned Courts below, that the Respondents had established their right in respect of the suit property, was perverse and baseless;

(C) Whether in view of the admission made by the Defendants in their statement before the Aval Karkun Record of Rights in Dispute Case No. 25 of Velguem, to the effect that the suit property surveyed under No. 9/1, was enjoyed by them and the Appellants, in common in half share, the conclusion drawn by the Courts below that the Appellants had failed to establish their enjoyment in respect of the suit property, was perverse.

6. Mr. Lotlikar, learned Senior Counsel appearing for the Appellants submitted that both the Courts below have not considered the effect of several documents produced by the Plaintiffs and have non-suited the Plaintiffs by ignoring the said documents. Mr. Lotlikar further submitted that the lower appellate Court though has referred to the documentary evidence relied upon by both sides, has not critically analyzed and considered the legal effect of the documents, more particularly certificate of description and description of the property of the Plaintiffs and also the statement of Defendant No. 1 before the Aval Karkun recorded on 18th March, 1982 with which he was confronted during the course of cross-examination. According to Mr. Lotlikar, these documents have direct bearing on the case set up by the Plaintiffs and establish the case set up by them and non-consideration of these documents, has resulted in the lower appellate Court dismissing the appeal without considering the legal effect of the documents thereby causing serious prejudice to them. According to Mr. Lotlikar, if the lower appellate Court had analyzed critically the oral as well as and more particularly, the documentary evidence, the lower appellate Court would have allowed the appeal preferred by the Appellants.

7. Mr. Kansar, learned Counsel for the Respondents submitted that the Plaintiffs have absolutely no right to the suit property. However, he fairly conceded that the documents referred to by Mr. Lotlikar have not been dealt with by the lower

appellate Court while analyzing the evidence led by both the parties. He further submitted that in the event this Court is inclined to remand the matter to the lower appellate Court, the lower appellate Court be directed to dispose of the appeal after critically analyzing the oral and documentary evidence led by both the parties.

8. In my opinion, Mr. Lotlikar, learned Senior Counsel is justified in making a grievance that the effect of the documents referred to by him, has not been considered by the lower appellate Court and as such, Mr. Kansar is justified in fairly conceding that the said documents have not been considered by the lower appellate Court.

9. In the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , the Apex Court has held that first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing on both the questions of fact and law. The judgment of the appellate court must, therefore, reflects its conscious application of mind and record the findings supported by the reasons on all the issues arising along with the contentions put forth and proved by the parties for decision by the appellate Court. It is well settled that the lower appellate Court while dealing with the appeal from a decree, has to critically analyze the evidence, oral and documentary evidence led by both the parties and after considering the reasons given by the trial Court, arrive at a decision by following the settled principles of interference by the first appellate Court. Indisputably, such an exercise has not been done by the lower appellate Court. I am, therefore, inclined to set aside the impugned judgment and decree passed by the lower appellate Court and remand the matter to the lower appellate Court for a fresh decision.

10. In view of the order, which I propose to pass, I do not deem it necessary to answer the substantial questions of law formulated.

11. In view of the above discussion, the impugned judgment and decree dated 6th June, 2000 passed by the Additional District Judge, Panaji in Regular Civil Appeal No. 66/1992 is quashed and set aside and the matter is remanded to the lower appellate Court for fresh decision. The lower appellate Court shall decide the appeal afresh after giving an opportunity of being heard to both sides and in the light of the observations made above and having due regard to the settled principles of interference by the first appellate Court. It is made clear that I have not expressed any opinion on the merits of the rival claims and the lower appellate Court shall expeditiously decide the appeal on its own merits in accordance with law considering the fact that the appeal was filed in the year 1992.

12. The parties either personally or through their Counsel, shall appear before the lower appellate Court on 10th February, 2011 at 10.00 a.m. There shall be no order as to costs.

13. Registry to ensure that the record and proceedings are sent to the lower

appellate Court expeditiously .