

(2012) 01 BOM CK 0016

In the Bombay High Court

Case No : Second Appeal No. 77 of 2007

Shri Quexova Madeva Prabhu (Expired) and Another

APPELLANT

Vs

Shri Shivanand Vassudev Salgaonkar and 10 Others

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Evidence Act, 1872 — Section 83

Citation : (2012) 01 BOM CK 0016

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

Bench : Single Bench

Advocate : R.V. Kamat, Adccocate, for the Appellant; Sudin Usgaonkar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this second appeal, the appellants take exception to the judgment and decree dated 23rd January, 2007, passed by the learned District Judge, South Goa, Margao in Regular Civil Appeal No. 51/2005, dismissing the appeal against the judgment and decree dated 21st April, 2005 passed by learned Civil Judge, Junior Division, Quepem in Regular Civil Suit No.23/2004/A, filed by respondent No.1 against the appellants and respondents No.2 to 11. The parties shall, hereinafter, be referred to as per their status before the Trial Court. The plaintiff filed the above suit against Shri Quexova Madeva Prabhu Dessai and his wife Mrs. Meera Quexova Prabhu Dessai seeking a declaration that the area shown in the plan, as encroached upon, is part and parcel of the plaintiff's property "DOVORNEACHEM MOLLA". The plaintiff also sought recovery of possession and permanent injunction. The suit was contested by the defendants. It was the case of the defendants that the encroached portion belonged to the defendants and, as such, the plaintiff had no right to the area alleged to have been encroached by the defendants.

2. The Trial Court, upon appreciation of the evidence led by the parties, decreed

the suit. An appeal preferred by the appellants herein has also been dismissed by the lower Appellate Court. Hence, the present appeal.

3. Mr. Kamat, learned Counsel appearing for the appellants urged that the plaintiff had not proved his title to the suit property, and, as such, both the Courts below have erred in decreeing the suit. Learned Counsel further submitted that according to the plaintiff, the suit property, a portion of which is alleged to have been encroached by the defendants, was allotted to him by a Deed of Partition dated 23rd March, 1972, as a member of Hindu Undivided Family. The learned Counsel further submitted that initially, the suit property was owned by one Madeva Vassudeva Salgaocar and it was the case of the plaintiff that the property was allotted on account of a partition amongst the members of Hindu Undivided Family, which concept does not exist in Goa. The learned Counsel, therefore, submitted that the plaintiff has no title to the suit property "DOVORNEACHEM MOLLA" and, as such, the decree passed by the trial Court and confirmed by the lower Appellate Court, deserves to be set aside. The learned Counsel further submitted that both the Courts below have relied upon the plans which have not been proved and, as such, the decree for possession of a part of the suit property could not have been passed by the trial Court and confirmed by the lower Appellate Court in the absence of proof of the said plans in terms of Section 83 of the Indian Evidence Act. The learned Counsel further submitted that both the Courts below have relied upon inadmissible evidence and, as such, the following substantial questions of law arise for determination in this appeal :

(1) Whether the trial Court/Appellate Court misconstrued/misconstructed documents viz. uncertified copies of the plans exhibited as Pw4/A and Pw.4/B (X-2 and X-3) by making them the foundation to decree the suit without examining the author thereof merely because the documents were stated by Pw.1 and Pw.4, to be the Portuguese plans ?

(2) Could the title of the plaintiff to the suit property and encroachment be decided on the basis of the uncertified copies of the plans Pw.4/A and Pw.4/B which are not proved in terms of Section 83 of the Indian Evidence Act, 1872 ?

(3) Whether the finding of the trial Court/Appellate Court in respect of the title to the property is perverse because the claim being by virtue of Partition Deed dated 23.3.1972 executed by one Mr. Vassudeva Madeva Salgaocar as Karta of a Hindu Undivided Family to allot by way of partition a property purchased by one Mr. Madeva Vassudeva Salgaocar by Sale Deed dated 28.8.1964 in his individual capacity, in view of law of transfer applicable to Goa ?

(4) Whether the trial/appellate court misconstrued the documents of title produced by the plaintiff namely the Partition Deed dated 23.3.1972 and the Sale Deed dated 28.8.1964 to bestow ownership of the suit property on the plaintiff enabling him to file and maintain a suit for declaration and possession ?

(5) Can a title derived from allotment made in partition by a "Karta" of a Hindu Undivided Family contrary to the Civil Code applicable to Goa be foundation for a

suit ?

In support of his submissions, Mr. Kamat placed reliance upon the judgments of the Supreme Court in the case of Sk. Sattar Sk. Mohd. Choudhari Vs. Gundappa AMabadas Bukate, and in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, .

4. Per contra, Mr. Usgaonkar, learned Counsel appearing for respondent No.1 submitted that in the written statement, the defendant did not dispute the title of the plaintiff and, as such, at this stage, the appellants are not entitled to challenge the title of the plaintiff. The learned Counsel further submitted that the defendants are also not entitled to challenge the plans upon which reliance has been placed by PW.4. The learned Counsel, after placing reliance upon the judgment in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, , submitted that at this stage, the objection regarding the mode of proof cannot be urged, since the documents have been taken on record, without any objection on the part of the defendants. The learned Counsel, therefore, submitted that no substantial question of law arises in this appeal and there are concurrent findings of fact recorded by both the Courts below, against the appellants and, therefore, the appeal deserves to be dismissed, summarily. Mr. Usgaonkar placed reliance upon judgments of the Apex Court in the cases of Jahuri Sah and Others Vs. Dwarka Prasad Jhunjhunwala and Others, , and Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., /

5. In rejoinder, Mr. Kamat submitted that there are concurrent errors and not concurrent findings of fact, as urged by the learned Counsel for respondent No.1.

6. I have carefully considered the rival submissions, perused the record and the judgments relied upon by the parties.

7. In so far as the submission made by Mr. Kamat that the plaintiff has not proved title to the suit property and consequently to the encroached portion of the land is concerned, a perusal of the plaint discloses that in para (2) of the plaint, the plaintiff has made averments regarding his title to the suit property. In para (2) of the written statement, the defendants have denied the contents of para (2) of the plaint for want of knowledge. In the case of Jahuri Sah and ors. (supra), the Apex Court has held that in terms of Order VIII, Rule 5 of C.P.C. every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. The Apex Court further held that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial. In my considered view, the ratio of the said judgment is squarely applicable in the present case. The defendants having not denied the title of the plaintiff in the written statement, nor having raised any such issue, either before the trial Court or before the lower Appellate Court, are not entitled to raise the issue for the first time in the second

appeal. In the case of Santosh Hazari (supra), the Apex Court has held that to be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case; an entirely new point raised for the first time before the High Court is not a question involved in the case, unless it goes to the root of the matter. The ratio in the case of Santosh Hazari (supra) is squarely applicable in the present case. The defendants having not challenged the title of the plaintiff to the suit property, are not entitled to raise the issue of title for the first time in the second appeal.

8. In so far as the submission made by Mr. Kamat regarding proof of the documents, more particularly, the plans which were tendered by the plaintiff through PW.4 Mariano Pinto is concerned, the record discloses that no objection was taken on behalf of the defendants for production of the document. In the case of R.V.E. Venkatachala Gounder (supra), the Apex Court while dealing with the objection as to admissibility of a document has held that the objections as to admissibility of documents in evidence can be classified as (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence, but is directed towards the mode of proof thereof on the ground of irregularity or insufficiency. The Apex Court further held that the objection under category (i) can be raised even after the document is marked as an exhibit or even in appeal or revision, but, the objection under category (ii) can be raised when the evidence is tendered, but not after the document has been admitted in evidence and marked as an exhibit. In my considered view, the objection taken by the learned Counsel for the appellants comes under category (ii) and, as such, the defendants having not taken any objection as to the admissibility of the document, the defendants are not entitled to raise the issue for the first time in second appeal. In my view, the ratio of the judgment in the case of R.V.E. Venkatachala Gounder (supra), is squarely applicable in the present case. Therefore, no substantial question of law arises in relation to the documents, as argued by the learned Counsel on behalf of the appellants. In view of the above, I hold that no substantial question of law arises in this appeal. There are concurrent findings of fact recorded by the Trial Court, as well as by the lower Appellate Court, which cannot be said to be perverse, warranting interference in the second appeal. Therefore, the second appeal filed by the appellants deserves to be dismissed and is, accordingly, dismissed, with no order as to costs.