
(2010) 07 BOM CK 0142
In the Bombay High Court
Case No : Second Appeal No. 411 of 2009

Shyamsunder Tiwari

APPELLANT

Vs

Smt. Pramilabai Ugemuge

RESPONDENT

Date of Decision : 15-07-2010

Acts Referred:

Citation : (2010) 07 BOM CK 0142

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

Bench : Single Bench

Advocate : V.S. Kukdey, for the Appellant; P.A. Deshmukh, for the Respondent

Judgement

A.P. Bhangale, J.—Considering the nature of dispute; as also pursuant to earlier order passed by this Court to call R & P in order to hear the matter at the stage of admission itself, this Appeal is taken up for hearing and final disposal at the stage of admission.

2. Heard submissions at the Bar. The learned Counsel for the appellant raised dispute regarding identification and boundaries of the suit plot. According to the appellant (ori.defendant), he had purchased Plot No. 68 from Rewatkar Layout, situated at Mouza Dighori, Nagpur admeasuring about 2000 sq.ft. from one Ratanchand Jain, in the layout carved out in land bearing Survey No. 55/2. In the same layout, the respondent/ori. plaintiff purchased plot No. 64 admeasuring about 2000 sq.ft. (50" x 40") from the same lay out. It is contended that Plot No. 64 which was purchased under registered sale deed dated 15.4.1970 by the plaintiff, had boundaries as follows: On East Plot No. 65; on West 30 ft. road; On north Plot No. 25 and on South Plot No. 68. In the identical manner boundaries of Plot No. 68 are stated to be: on East Plot No. 65; on West 30 ft. wide road ; on North Plot No. 64 and on South Road. Both the plots are admittedly admeasuring 50" x 40" with area approximately 2000 sq.ft. The plaintiff had filed suit for possession, damages, and monetary as well as perpetual injunction against the defendant (present appellant) alleging that he had encroached over the plot belonging to the plaintiff and made construction on the plot which, in

fact, belonged to the plaintiff. Regular Civil Suit No. 2025/1992 was instituted. The defendant by written statement dated 5.1.1992 denied the averments of the plaintiff and prayed for dismissal of the suit.

3. The suit was heard by learned 8th Joint Civil Judge, Junior Division, Nagpur who partly decreed the same. The trial Court found that encroachment was made by defendant on the Plot No. 64 belonging to the plaintiff. It appears that during pendency of the suit, both the learned Counsel representing the parties had agreed for appointment of Shri Ratanchand Jain as Court Commissioner to measure the disputed plots belonging to the plaintiff and defendant. Accordingly, the evidence of the plaintiff was deferred till Shri Ratanchand Jain executed the commission work and filed report at Exh.49 in the trial Court. The Commissioner was cross-examined with reference to Commission's report (Exh.49). The registered sale deed on the basis of which the plaintiff and defendant claimed their title were also on record as Exh. 38 (plaintiff's sale deed) and Exh.62 (defendant's sale deed). The trial Court appears to have admitted the map in respect of the plots produced by the Court Commissioner who was admittedly predecessor-in-title for both the plaintiff as well as defendant. The Commissioner was also allowed to be examined by the parties regarding this report Exh. 49. The trial Court observed that the defendant had agreed for appointment of Shri Ratanchand Jain as Court Commissioner as also the plaintiff and under these circumstances since he was also predecessor-in-title for both the plaintiff as well as defendant in respect of their plots, his evidence was considered vital in the case and the trial Court concluded that the plaintiff has proved that the defendant made encroachment on her plot, despite the fact that she had made wooden fencing surrounding the plot purchased by her. As such, her evidence was believed that the structure constructed by the defendant is on plot No. 64 belonging to the plaintiff. Thus, suit came to be partly decreed, with direction to the defendant to remove the illegal construction and material from Plot No. 64 of Rewatkar Layout as per Schedule appended with the plaint. However, the trial Court had dismissed the claim as to damages although it granted permanent injunction against defendant restraining him from making any illegal construction or creating any lien or charge over the suit Plot No. 64.

4. The defendant aggrieved by the decree passed by the trial Court, challenged it before the District Court, Nagpur, by filing Regular Civil Appeal No. 264/1996 on 10.6.1996; while plaintiff who was also aggrieved by refusal of damages filed Regular Civil Appeal No. 302/1996 on 21.6.1996. The defendant's appeal was dismissed; whereas plaintiff's appeal for mesne profit/damages was allowed. It appears that the lower Appellate Court vide its common judgment dated 24th November, 2008 in respect of said appeals, considered the evidence in the light of submissions and found that the defendant had carried out construction on Plot No. 64 belonging to the plaintiff. The conclusions have been based upon lay out map Exh. 57 sale deed Exhs. 62 and 38 read along with Commissioner's report and his cross-examination in respect of his report Exh. 49 .

5. Learned Counsel for appellant raised substantial questions of law as follows:

(i) Whether the Courts below are justified in entertaining a suit for removal of encroachment and for possession, when admittedly no exact description of alleged encroachment is given in the plaint by the plaintiff?

(ii) Whether the Courts below have not committed error and material irregularity in relying upon the unsigned plaint map of unauthorised layout filed by plaintiff while decreeing the suit?

(iii) Whether the observations of the learned Trial Court in para 11 of its judgment for relying on the map is correct and whether the learned trial Court is justified in relying on the plaint map by saying that "plaint map is nothing but the pleadings of the parties by way of line in the sketches" is proper?

(iv) Whether the impugned judgment and decrees passed by both the Courts below are sustainable and whether impugned judgment and decrees are executable since the description of the suit property given by the plaintiff is not matching on the site. In this regard it is an admitted fact that the Plot No. 64 and 68 are adjacent to each other. The Plot No. 64 is on the northern side of Plot No. 68 and on the southern side of the plot No. 68 there is a road. However, actually on both the sides of plot No. 68 there is a road and on this plot only there is a construction of the appellant. This both the courts below failed to appreciate and thus arrived at wrong conclusion, therefore, for this reason and for the reasons stated above, the impugned judgments and decrees are liable to be quashed and set aside.

6. Considering the substantial questions of law as raised, in essence, it appears that dispute is regarding identity of Plot No. 64 of which the sale deed is also on record, the Court Commissioner who was admittedly predecessor-in-title in respect of the plot in question was examined in the trial Court and was also allowed to be cross-examined and concurrent findings have been recorded by both the Courts below that the defendant had constructed over Plot No. 64 belonging to the plaintiff. Consequently, the defendant was directed to take away the construction and the material from Plot No. 64 and incidental reliefs were granted, such as, order as to mesne profits, injunction etc. Since it appears that the appointment of the Court Commissioner was made by consent of the parties and furthermore the Commissioner was also allowed to be cross-examined, no grievance can be made about the evidence led by the Court Commissioner regarding identity of the Plot No. 64 which was sold in favour of the plaintiff under registered sale deed; as also his observation in the report. Substantial questions of law as pleaded, therefore, would not arise.

7. Learned Counsel for the respondent made reference to *Sarita Narendra Shahu v. Public Cooperative Housing Society Limited* reported in 2010 (2) Mh.L.J. 308. It is contended that no objection was taken on behalf of the appellant when Court Commissioner's report was exhibited. The concurrent findings have been recorded in respect of the evidence led by the Court Commissioner who is

admittedly a predecessor in title of the plaintiff as well as defendant. As held by this Court, therefore, the objection ought to have been taken before the document was exhibited. In other words, once the document exhibited and concurrent findings have been recorded in respect thereof, there would not arise any substantial question of law regarding admissibility of such evidence fixing the identity of Plot No. 64 belonging to the plaintiff and the specific observations made by the Court Commissioner that the defendant had constructed over the Plot No. 64 belonging to the plaintiff. It appears that the trial Court in order to fix identity of the plot in question, appointed a Court Commissioner whose name was acceded to by both the parties and oral evidence of the Court Commissioner was also recorded before deciding the case. According to the learned Counsel for the appellant, the City Surveyor ought to have been appointed while learned Counsel for the respondent stated that, in fact, an application was made at Exh. 16 by the plaintiff for appointment of the City Surveyor to visit the suit plot and to measure it. However, that was objected to by the defendant in the trial Court. Be that as it may; it would now be a question of execution of the decree and the Court executing the decree may if it deems it necessary, appoint City Surveyor with a view to execute the decree effectively and properly. With these observations, I do not find any merit in the Second Appeal, more particularly when the concurrent findings of Courts below are not to be interfered with in respect of pure questions of fact as there would be no justification to interfere with the findings of facts. The High Court is not expected to substitute its own findings or to re-appreciate the evidence merely on the ground that another view may be possible even assuming for the sake of argument that findings of facts recorded by the Courts below are erroneous as already observed it is for the executing Court to properly and effectively execute the decree. No interference is required in the impugned judgment and orders. The appeal is therefore dismissed.

8. At this stage, learned Counsel for the appellant prays for keeping the judgment in abeyance for a period of six weeks, which was objected to tooth and nail, at the instance of learned Counsel for Respondent. Considering the observations made by me in the judgment and finding, no substantial question of law is involved in this Appeal, the prayer is rejected.