
(2008) 01 BOM CK 0170
In the Bombay High Court
Case No : Second. Appeal No. 67 of 1996

Smt.Shamlata and Others

APPELLANT

Vs

Vishweshwara Tukaram Giripunje and Another

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 40, 41, 42, 43, 44

Citation : (2008) 01 BOM CK 0170

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : J.J. Chandurkar, for the Appellant;

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—This is a defendant's second appeal. The facts giving rise to this appeal are as follows:-

The suit was initially instituted by one Surendrasing Ramarao Naik through his constituted attorney Shri Vishveshwar Tukaramji Giripunje. Subsequently, the original plaintiff Surendrasing sold the suit property to his constituted attorney Vishveshwar. Both now are plaintiffs in this suit. The defendant Manohar is the neighbour of plaintiff.

The plaintiff is the & owner of open land in ward No. 26, Circle No. 6 Zilla Road. Mahal Nagpur.

The defendant has his house towards North of the said land bearing Municipal Corporation No. 342/1. The plaintiff submits that the defendant has committed encroachment shown by letters HBCDNPT as shown in the plaint map, and the encroachment is to the extent of 159 sq.ft. It is alleged that the defendant committed the encroachment by constructing a Well in the year 1980. The plaintiff further contends that there was a dispute regarding the land ABCDEFGH covered by the lines in the plaint map with the Nazul department, who claimed

that the land belonged to the nazul department. The plaintiff had, therefore, instituted Civil Suit No. 312/95 against the Collector of Nagpur. The suit came to be decreed in favour of the plaintiff and plaintiff was declared to be the owner. The appeals preferred by the State before the District Judge and the High Court were rejected. The plaintiff submits that since the plaintiff was out of Nagpur for quite some time on account of the fact that he had shifted his residence to village Kawatha, the defendant took disadvantage of the fact and committed encroachment. The plaintiff seeks to remove this encroachment and prays for a decree for possession of the site.

2. The defendant has filed the written statement. The defendant does not dispute that the plaintiff is the owner of area known as Naikwadi and he owns landed property in Nagpur. The defendant denies that the plaintiff is the owner of the plot shown by letters ABCDEFGH. He also denies that he has committed encroachment on the site as contended by the plaintiff. The defendant also denies that there was any dispute between plaintiff and the Government over the suit land and that the proceedings ended in favour of the plaintiff. The defendant submits that his house was purchased in the year 1935 from one Sitabai Giripunje. The defendant has been in possession of the property since more than 40 years adversely, and, to the knowledge of the plaintiff uninterruptedly. It is contended that, therefore, the suit is barred by limitation. It is further contention of the defendant that in the year 1982 there was a measurement by the City Survey Department in which it was found that the defendant has not committed any encroachment and plaintiff did not prefer any appeal against the said measurement. The defendant, therefore, prayed that the suit be dismissed.

3. The learned Judge of the trial Court framed issues and found that the plaintiff is the owner of the site ABCD EFGH and defendant had committed encroachment. He has also found that the defendant was not in adverse possession. Holding so, he decreed the suit in favour of the plaintiff. The appellate Court concurred with the findings recorded by the trial Court. The second appeal was admitted by Patel, J. on ground No. 2, which reads as follows:-

"That as a matter of fact the entire burden to establish that the title to the property in suit vested originally in plaintiff No. 1 and on his alleged transfer in favour of the plaintiff No. 2 in the plaintiff No. 2 and there being no evidence whatsoever to establish the transaction as result of which title was said to have been created in favour of the said plaintiff, merely putting on record certain irrelevant judgments which were clearly inadmissible in view of the mandatory provisions of Section 43 of the Indian Evidence Act, the Courts below have passed a decree in favour of the plaintiffs for which there is no foundation on the record."

4. I have heard the learned counsel for the appellant. None appears for the respondents.

5. The learned counsel for the appellant contended that the Courts below have relied upon the documents on which it could not have. The plaintiff has pleaded that he had instituted a suit for declaration of his ownership against the State of Maharashtra and the suit was decreed in his favour. The plaintiff has placed on record the judgment delivered in that suit and the appeals thereon. The certified copies of the judgments of the Courts have been filed on record. They are Exhs.51, 53 and 54. Exh.51 is the copy of the trial Court judgment. Exh.53 is the copy of the judgment of the first appellate Court while Exh.54 is the judgment of the High Court. As said, the suit was between the original plaintiff and the State. It appears that the Nazul Tahsildar had given notice to the plaintiff-tenant to remove the encroachment on the said site and therefore, the suit was filed. The suit was decreed. The question is whether this judgment is at all relevant. The learned counsel for the appellant submitted that this judgment does not fall within the scope of Sections 40 to 44. The judgment does not fall within the scope of Section 11 of CPC since the present defendant was not party to that suit. Obviously, therefore, that judgment does not fall within the scope of Section 40 of the Evidence Act. It is not relevant u/s 41 because it is not a judgment delivered in exercise of probate, matrimonial, admiralty, or insolvency jurisdiction. It is no relevant because it does not relate to matter of public nature. It also does not fall within the scope of Section 43 since existence of such judgment is not fact in issue. The learned Judge of the first appellate Court as well as the trial Court could not have, therefore, looked into this judgment for any purpose, for they are irrelevant. It appears that the learned Judge of the trial Court as well as the appellate Court have relied upon the certified copy of the plaint in Civil Suit No. 312 of 1965 (Exh.52). Both the Judges have held that the document i.e. plaint can be read as it is a public document. Both seem to be under misconception. The certified copy of the plaint is not a public document. Hence, it requires proof. For proving such document, the original plaint should have been called in the Court. That is not done, hence the certified copy of the plaint could not be said to be proved at all. The Courts below, therefore, were not justified in putting reliance on this copy of the plaint. The conclusions of the Courts below, however, are not based on the judgment alone between plaintiff and Government, but independently the Courts below have concurrently found that there is an encroachment on plaintiffs land. In this regard, it is seen that this land house of original plaintiff No. 1 is ancestral and hence there is no document of title with the plaintiffs. Plaintiff No. 2 has purchased the property during the pendency of the suit hence that sale deed carries no importance. But the defendant's title to his house is derivative, in as much as his mother has purchased the house and land in 1935. This sale-deed has been placed on record at Exh.65. Although the plaintiffs do not have sale-deed and land is claimed to be an ancestral, plaintiffs have placed on record two important documents. They are Exh.60 - the record of rights. The area of the plaintiffs' land is shown to be 124.2 sq. meter in the said record of right. Second document is Exh.61 - the map of City Survey Department. The map shows that the land was measured by department in presence of plaintiffs as well as defendant and other adjoining

owners. The area of the plaintiffs plot No. 504 is shown to be 124.2 sq.mtr. in this map also. This measurement was done on 15.05.1982.

6. Although these two documents are on record, the material thing that needs consideration is whether the plaint map prepared by PW3 Balwant - retired Talathi - could be relied upon to hold that there is an encroachment on plaintiffs land and if there is one, what is the extent. This is the only map (Exh. 76) on record, as far as measurement of the site is concerned. It appears to me that it would not be proper to rely on this measurement map, for the site does not seem to have been measured scientifically and after notice to the defendant. PW3 Balwant in examination-in-chief says that he measured the site on the basis of 1920 map and it was shown to him by Surendrasing - the plaintiff. It is not clear if it was a Survey map drawn by Government agency or department or a private map. Whatever that was, that too should have been placed on record. He admits in cross-examination that he had not seen the title-deed of either party. He also states that the map is drawn as told by Surendrasing. He says that he does not know the number of the map and he did not bring those notes of measurement before the Court. It is obvious that the map was drawn as suggested by Surendrasing - the plaintiff. It is not a & measurement done independently and on basis of authenticated documents. He does not say if he had seen any document before he measured. One, therefore, wonders as to how then he could determine the boundaries of the plots of the plaintiff as well that of the defendant. He does not say if he found any fixed mark of survey department at any spot and that he measured it taking that point as base point. It is, therefore, clear that the measurement map (Exh.26) cannot be taken as a correct map. The Courts below, therefore, should have appointed a Commissioner to measure not only the plot of the plaintiff but that of defendant also with reference to defendant's sale deed (Exh. 65) and also with reference to survey map (Exh.61). It also appears that plaintiff had filed on record a certified copy of the sanction plan of house of plaintiff and it is at Article "B". This sanction plan of plaintiffs house is of the year 1923. Obviously, it is a very old document and material document to determine the exact extent of the land of plaintiffs site. Since sale deed of the plaintiffs site is not available, this document would be of immense help at the time of the measurement. In fact, therefore, the above documents would certainly have helped the measurer to measure the land and for the Court to determine the question of encroachment correctly. To my mind, therefore, the Courts below erred in not appointing a Commissioner to measure the site of the plaintiff and defendant both with reference to these documents. In order that the suit is finally and effectually decided, it is, therefore, desirable to have measurement of both the sites which measurement can be undertaken by Surveyor from the City Survey Department. It is, therefore, now necessary to remand the matter back to the trial Court.

1) The appeal is, therefore, allowed.

2) The Judgments and decrees passed by the Courts below are set aside.

3) The matter stands remanded to the trial For fresh decision. The trial Court shall appoint Surveyor/Commissioner from the City Survey Department to measure the sites of, plaintiff and defendant both.

4) While making an appointment of the Commissioner, the trial Court shall issue instructions to the measurer to measure the land according to the observations in the preceding paragraph of this judgment and obtain the correct measurement map showing encroachment, if any, from the said Commissioner.

5) The parties are given liberty to tender evidence as they may choose in the matter. The trial Court shall then decide the suit afresh within period of six months positively.

6) The parties shall bear their own costs.