
(2005) 12 BOM CK 0031
In the Bombay High Court
Case No : Second Appeal No. 215 of 1996

Sushila Dhanbaji Kadu

APPELLANT

Vs

Birju Mangal Pache and Others

RESPONDENT

Date of Decision : 14-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Evidence Act, 1872 — Section 83

Citation : (2006) 2 ALLMR 75 : (2006) 5 BomCR 859

Hon'ble Judges : Chavan R.C., J

Bench : Single Bench

Advocate : A.Z. Jibhkate, for the Appellant; B.M. Sathe and 2, for the Respondent

Final Decision : Dismissed

Judgement

Chavan R.C., J.—This is an appeal by the plaintiff in Regular Civil Suit No. 5 of 1988 for recovery of possession, which was decreed by the learned Civil Judge, Jr. Dn., Katol, but the decree was reversed on appeal by the learned 6th Additional District Judge, Nagpur.

2. The appellant/ plaintiff claimed to have purchased property bearing Plot No. 386/3.5 is Ward No. 5 of Katol by a registered Sale deed on 2-6-1971. The plaintiff claimed to have constructed a shed shown by letters "BIHMLKJB" in the plaint map. She allowed the defendant to reside there as her licensee. When she wanted to start construction of a latrine in the property, the defendant obstructed and approached Naib Tahsildar questioning the plaintiffs title. The plaintiff, therefore, revoked his licence by notice dated 16-12-1987 and asked the defendant to vacate the premises. Since the defendant refused, the plaintiff filed the suit stating that she wanted to demolish the entire shed and construct a house and, therefore, needed possession of the property.

3. The defendant resisted the plaintiffs claim by contending that the structure in question was permanent one in existence since 1941 and was owned and

possessed by the defendant and his forefathers. According to the defendant, this structure was on public site and not that of the plaintiff. He, therefore, prayed for dismissal of the suit.

4. After considering the evidence tendered in the light of the issues framed, the learned trial Judge held that the plaintiff proved that the defendant was her licensee and that the plaintiff had revoked the license. The learned trial Judge, therefore, decreed the suit.

5. On appeal, the learned 6th Additional District Judge held that the defendant's structure was on the land belonging to Katol Municipal Council. He negatived the plea of adverse possession but held that the plaintiff was disentitled to recover possession. He, therefore, allowed the appeal and directed dismissal of the suit.

6. The plaintiffs second appeal was admitted on substantial questions of law framed in the memo of appeal. The sum and substance of the points, on which the judgment of the first Appellate Court is challenged, is that the learned Additional District Judge erred in ignoring the Map Exh. 42 which was proved by P.W. 2 Krishnarao on irrelevant grounds, like whether it was a plaint map or not, or whether it was secondary evidence. If the learned Judge of the First Appellate Court felt that the map was not correct, the Judge should have appointed a Commissioner for measuring the disputed site.

7. I have heard the learned Counsel for the appellant. The learned Counsel submitted that since the learned Additional District Judge has found that the map proved by P.W. 2 Krishna was not reliable, the learned Judge ought to have appointed a Commissioner to measure the sites and draw an accurate map so as to assist the Court in disposing of the appeal. For this purpose, he drew my attention to a decision of this Court in Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade, . He submitted that the course taken by this Court in the said decision, viz. remanding the appeal for appointment of Commissioner, would be the most appropriate course of action.

8. In the decision on which the learned Counsel relied, the dispute was about encroachment of about 4 gunthas of plaintiffs land by defendant. The parties were agreed that they owned Survey No. 5/1-B and Survey No. 5/1 respectively in their village. The field of the plaintiff had been measured by the cadastral surveyor, on the basis of whose map, the plaintiff had sought to recover the possession of his land under encroachment. Since both the courts below had found in favour of the plaintiff, the defendant has approached this Court and after considering all the relevant aspects after referring to decision of Supreme Court in Ram Kishore Sen and Others Vs. Union of India and Others (UOI), , the Court observed that Section 83 of the Indian Evidence Act enabled the Court to presume that the maps made by the authority of the Central or State Government to be accurate, but maps prepared for the purpose of any cause have to be actually proved to be accurate. The Court also observed that when there is a dispute about the encroachment or dimension of a site, the first

essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same. Relying on a decision of Nagpur High Court in the case of Krishnarao v. Mahadeorao reported in 1953 N.L.J. 230, in para 7 of the judgment in Kashinath v. Haribhau the Court observed as under:

Under Order XXVI, Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local investigation or not. The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its pecuniary (peculiar) nature can only be had on the spot. The cases of boundary disputes and disputes about the identity of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of CPC 12 I.C. 347 Foll. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon. Oral evidence cannot conclusively prove such an issue.

9. It may be seen that the decision of the Nagpur High Court in form of a Note to which this Court had made reference speaks of the discretion of the Court to order local investigation and desirability to get the fields measured by an expert to find out the area encroached upon. It does not lay down inflexible rule of law that in every case when the plaintiff comes up with the claim of recovery of land encroached upon, the Court is obliged to appoint a Commissioner and get the lands measured. For, in doing so, the Court would be, first, taking over the job of the parties to prove their own cases; secondly, entering into speculative area since the result of such measurement may be entirely unknown, which may not be in tune with the case set up by the parties; and lastly would amount to abdicating its function of assessing and evaluating the evidence tendered before it, by passing over the job of finding out whether there is encroachment to a cadastral surveyor. The desirability of having a map prepared by an independent agency to assist the Court cannot be undermined, but it does not follow that the courts must, in all cases of encroachment, resort to the power of appointment of the Commissioner.

10. Be that as it may, the facts in the instant case are altogether different. The claim in the present suit is not based upon any allegations of encroachment. Here the plaintiff has come up with a specific case that after purchasing the property she had constructed a shed and inducted the defendant as a licensee in the said shed. This claim of the plaintiff was not borne out from her own evidence before the trial Judge. She categorically stated in the examination-in-chief itself that though she is the owner of the land, the defendant constructed a hut thereon, falsifying the case made out in the plaint. In cross-examination she admitted that the premises in possession of the defendant are of the same size since the time when she purchased the plot from Gulabbhai. She admitted that she did know since how many years the defendant had been residing in the suit plot before she purchased it and whether the defendant has been residing in the

suit plot since 60 to 70 years. Thus, the plaintiff had falsified the very foundation on which she had sought to recover possession from the defendant viz. that she constructed a shed and inducted the defendant as licensee, after the said shed was constructed. In view of this, there is no question of measurement of sites in possession of the plaintiff or the defendant respectively. There is no need of referring to map Exh. 42 proved by P.W. 2 Krishna. Consequently, the conclusion drawn by the learned Judge of the First Appellate Court does not call for any interference. As a result, the appeal fails and dismissed with costs.