

(2022) 04 BOM CK 0055
In the Bombay High Court
Case No : Second Appeal No. 55 Of 2004

Vithalrao Krishnarao Jadhav And Others	APPELLANT
Vs	
Gurudas Shambhu And Others	RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Limitation Act, 1963 — Article 58, 65
Code Of Civil Procedure, 1908 — Order 1 Rule 3, Order 1 Rule 5, Order 6 Rule 2, Order 18 Rule 2, Order 18 Rule 4, Order 40 Rule 31
Limitation Act, 1963 — Section 27

Citation : (2022) 04 BOM CK 0055

Hon'ble Judges : A.K. Menon, J

Bench : Single Bench

Advocate : S.D. Lotlikar, Sailee Kenny, Parikshit Sawant, Nehal Vernekar

Final Decision : Dismissed

Judgement

A.K. Menon, J

1. This Appeal was Admitted on 16.12.2004 framing the following question of law:

(1) Whether on the basis of the evidence, oral and documentary placed before the Trial Court, the plaintiffs were entitled for a decree directing the deletion of names of the defendants from the revenue record in respect of the suit property ?

2. The Appeal remained pending since then and on 16.02.2022, the Court was of the opinion that in addition to the solitary question framed, the following three further questions would arise for consideration in this Appeal:

(2) Whether the suit filed by the appellants was barred by limitation ?

(3) Whether the suit could be said to be bad in law in its entirety for non-joinder/mis-joinder of parties ?

(4) Whether the Appellate Court was justified in discarding the documentary evidence of title brought on record on behalf of the appellants, on the ground

that there was lack of pleadings ?

3. Based on these four questions, the Appeal has been urged before me for final disposal. The factual matrix of the matter as gathered from the record indicates that the plaintiffs, who are 3 in number had filed Regular Civil Suit No. 17/1999 against 13 defendants. The suit sought the following reliefs:

(a) That this Honourable Court be pleased to declare that the plaintiffs are the absolute owners in possession of the suit property and the defendants have no right, title or interest over the suit property.

(b) That this Honourable Court as a consequential relief to the above declaration be pleased to order, or direct by issuing mandatory injunction to delete and/or remove the names of the defendants (or of their ancestors) from the land revenue, survey records pertaining to the suit property viz. Annexure 'C'.

(c) That his Honourable Court, as a consequential relief, be further pleased to issue a perpetual injunction restraining the defendants, their servants, collies or anybody on their behalf from interfering with the peaceful possession and enjoyment of the suit property by the plaintiffs.

(d) Permission to amend the suit plaint as and when necessary.

(e) Costs of the suit may please be awarded.

(f) Any other equitable relief which this Hon'ble Court deems fit may kindly be granted.

4. The effective reliefs in the suit were three fold; (i) A declaration that the plaintiffs were owners of the suit property to the exclusion of the defendants; (ii) As a consequential relief of a declaration to that effect, the defendants' names were liable to be removed from the land survey record pertaining to the suit property and (iii) Perpetual injunction restraining their servants and agents and others on their behalf from interfering with the plaintiffs' possession.

5. The Trial Court after considering the pleadings, framed issues on (i) plaintiffs' entitlement to a declaration of exclusive ownership and possession (ii) whether plaintiffs' are entitled to a mandatory injunction, deleting the names of the defendants (iii) whether the plaintiffs were entitled to a perpetual injunction (iv) whether the suit is bad for non-joinder or mis-joinder (v) whether the suit suffers from delay, laches and is barred by law of limitation.

6. On these issues, the parties went to trial. The suit was dismissed. On the aspect of possession and injunction, the Trial Court held that the testimony showed that the plaintiffs were in possession of the suit property, yet finding that the plaintiffs have not impleaded all the necessary parties, the declaration could not be granted.

7. On the second issue, the Court held that the mandatory injunction for deletion of the names of the defendants cannot be granted. On the issue of limitation, the

Court found in favour of the plaintiffs and held that the suit is not barred by law of limitation.

8. The plaintiffs having admitted that certain necessary parties were not impleaded, the declaration sought was answered against the plaintiffs. As far as the declaration of ownership and the direction to remove the names of the defendants or their ancestors from the land revenue and survey record are concerned, the plaintiffs failed to prove the same. In the operative portion, the suit came to be dismissed on the ground that the plaintiffs had failed to prove their case.

9. Aggrieved by the said decree, the plaintiffs filed an Appeal before the IInd Second Additional District Judge, North Goa, Panaji. After briefly advertng to the facts that the Trial Court answered three points on absolute ownership claimed by the plaintiffs, the Appellate Court held in the negative. Thus, the appellants had not succeeded in proving that they were entitled to absolute ownership and injunction, restraining the respondents from interfering with peaceful possession. The Court also held that the appellants had no cause of action to file the suit. The Appellate Court also held that the suit was barred by law of limitation. Effectively the plaintiffs were non-suited, the Appeal was dismissed, thus, upholding the decree. Being aggrieved, the appellants are in Second Appeal.

10. On behalf of the appellants, Mr. Lotlikar, learned Senior Advocate led the arguments. The appellants have also filed brief written submissions so have the respondents who are represented by Mr. Sawant. Mr. Lotlikar has made submissions on non-joinder of the parties. The entitlement of the appellants to an injunction supported by his contention that the evidence produced before the Appellate Court could not have been rejected since it was not pleaded and that the defendants could not have succeed on the ground of limitation in the facts of the present case. Mr. Lotlikar submitted that the appellants having been found in possession of the property, they were entitled to protection and dispossession except in due process of law against the respondents, who were already before the Court. According to him, it was not necessary for all the parties claiming co-ownership to be heard for granting protective orders of injunction. He submitted that even a co-owner can maintain a suit against a trespasser. Even if, the prayer for declaration cannot be granted, permanent injunction could be granted on the basis of proof of ownership of possession and the dismissal of the suit was incorrect.

11. Mr. Lotlikar submitted that if the appellants had succeeded in proving the possession, the relief of injunction ought to have been granted specially since the Trial Court had concluded that the defendants had not established tittle to the property nor possession. Having come to the finding that the appellants were in the possession and the respondents were not, the possession of the appellants ought to have been protected. The first Appellate Court has proceeded on the basis that the Trial Court did not have the benefit of certain documents, which were produced before the first Appellate Court. The documents were produced

without any exhibit and those very documents established that the appellants were owners of the property and in possession of the property.

12. Mr. Lotlikar submitted that the first Appellate Court having found that the appellants were in possession of the suit property, it ought to have accepted the appellants' title as well as on the basis of the documents produced. Relying upon *Santosh Hazari Vs. Purushottam Tiwari*, AIR 2001 SC 965 and *K. Karuppuraj Vs. M. Ganesan* (Civil Appeal Nos. 6014-6015 of 2021), Mr. Lotlikar submitted that the Supreme Court has held in these cases as well that if the Appellate Court intends to reverse the finding of fact, it must come in close quarters in reasoning and must assign its own reasons in arriving at a different finding.

13. Quoting from the decision of the Chief Conservator of Forest, Government of Andhra Pradesh Vs. Collector & Others AIR 2003 SC 1805, Mr. Lotlikar canvassed the appellants' case that possession of property is prima facie proof of ownership of the person claiming ownership and can cast the burden on the parties denying ownership. According to Mr. Lotlikar the respondents are trespassers and the appellants had a good title in them and were in lawful possession. He relies on *Somnath Burman Vs. Dr. S.P. Raju & Others*, 1969 (3) SCC 129 to buttress his case that possessory title is a good title as against anyone. He submits that the first Appellate Court had clearly erred in observing that the documents of the title ought not have been pleaded.

14. Mr. Lotlikar relied upon the decision in the case of the Mazania of the temple of Shree Mahalaxmi Vs. Arvind Gajanan Shenvi Ghatkar & Another [Writ Petition No. 1713/2021 (F)]. Mr. Lotlikar then adverted to the aspect of limitation and contended that there is no question of limitation coming into focus in a suit based on title. Once the ownership and title are established, there is no question of the defendants claiming ownership and succeeding on such an issue. According to him, the respondents have not claimed adverse possession. In this behalf reliance is placed on the decision of the Supreme Court in the case of *L.N. Aswathama & Others Vs. P. Prakash*, (2009) 13 SCC 229. On the need to grant permanent injunction, Mr. Lotlikar submitted that the cause of action in a case at hand would always be a continuous one. As and when the plaintiffs possession are threatened the suit may be filed to restrain such possession. The appellants were not required and had not pleaded any specific cause of action and in the instant case, the respondents were inclined to interfere with the appellants possession of the property and hence, the relief of injunction ought not to have been granted for the asking. He, therefore, submitted that the questions be answered accordingly in favour of the appellants.

15. Mr. Sawant, who represents the respondents contended that there were concurrent findings on the issue and hence, the respondents have a preliminary objection since the appellants had claimed a declaration and consequential reliefs of mandatory and permanent injunction. He submitted that no injunction could have been granted unless the appellants succeed in obtaining a declaration.

16. Mr. Sawant submitted that the suit was bad for non-joinder and all co-owners had not been impleaded and those person have rights and interest in the suit property. A declaration of ownership could not have been passed without hearing those persons. According to the respondents, the present Appeal is not maintainable since the suit was barred by the law of limitation and also bad for non-joinder of necessary parties and non-disclosure of cause of action.

According to Mr. Sawant, the appellants must succeed on their own without being allowed to rely on the witnesses on the respondents' case. He submitted that the predecessors of the respondents, who were alive at the time of filing of the suit, were already featured in Form I & XIV in respect of the suit property.

17. It is contended that the judgment of the Trial Court has merged with that of the first Appellate Court and as such, the Trial Court had correctly dismissed the suit filed by the appellants, finding it barred by limitation for non-joinder of necessary parties and non-disclosure of cause of action. The issue of title of possession has been answered in the negative by the first Appellate Court and this Appeal does not raise any substantial questions of law. It is contended that no interference is called for in view of the concurrent findings of the Trial Court and the first Appellate Court on the issue of limitation, non-joinder and non-disclosure of cause of action. The suit being barred by law of limitation it is evident that no reliefs could be granted in the suit and hence, the suit was correctly dismissed. According to Mr. Sawant, the appellants had never canvassed that the respondents were disturbing their possession. According to Mr. Sawant, the appellants were well aware of the fact that since 1981 the names of the respondents alongwith that of Akabai K. Jadhav came to the knowledge of the appellants for the first time on 22.01.1999, which is the case pleaded by the respondents. Mr. Sawant further submitted that the appellants were aware of the fact that the names of the respondents featured in Forms I & XIV and hence, sought deletion, which was declined. That no oral and documentary evidence was adduced to substantiate the alleged cause of action.

18. Mr. Sawant pointed out that under Article 58 of the Limitation Act, the suit for declaration must be filed within three years when the right to sue accrues. Likewise under Article 65 of the Limitation Act, the suit for possession has to be filed within twelve years from the date of possession, the possession become adverse and in view of Section 27 of the Limitation Act upon the expiry of the period of limitation, the appellants right would stands extinguished. The respondents possession became adverse in 1981 and therefore, the suit is barred by limitation.

19. In course of submissions, Mr. Sawant has referred to appellants evidence on co-ownership, however, we are not concerned with that aspect in a Second Appeal, which is restricted to questions at hand. Adverting to the issue of non-joinder of necessary parties. Mr. Sawant submitted that the suit for declaration of title would necessarily require all parties to be added without which no effective decree could be passed. The appellants had failed to implead all the parties and

hence, had to suffer rejection of the suit.

20. This is an aspect that has been discussed thoroughly by the District Court, which gave its finding that the appellants being not joined as necessary parties required to maintain a suit for declaration. Mr. Sawant submitted that it was for the appellants to prove how to establish the title which they had failed to do. The appellants were aware that some of the respondents were married and had legal heirs who were named in Forms I & XIV, yet they were not impleaded.

21. Reliance was placed on the decision of this Court in the case of Yeshwant Siuram Porobo Vs. Gagarama Loximona Shet Gaunkar, (1990) 2 Goa LT 220. In my view it is necessary to make reference to the decision in the case of Yeshwant Siuram Porobo (supra) for the aforesaid purpose since for a declaration to be effective against parties, Order I, Rule 3 of CPC provides that all persons may be joined in one suit as defendants where the right to relief arising out of the same act or transaction is alleged to be against the same person or series of persons jointly, severally or in the alternative separate suits were brought for common questions of law that arises. What is critical to note is that Yeshwant Siuram Porobo (supra) also considered a case where the plaintiff was also claiming restoration of possession in the absence of other co-owners and hence, can be differentiated. In the case at hand, possession was not disputed and that the appellants were not seeking restoration of possession.

22. Order I, Rule 5 of CPC also provides that the defendants need not be interested in the relief claimed in the suit. Mr. Sawant therefore submitted that the questions be answered in the favour of the respondents. While submitting that cause of action in the plaint had not been disclosed at all. He relied upon the decision of the Trial Court which in answer to point 3 held that no evidence, oral or documentary had been adduced to substantiate cause of action including the communication with the Bank officials etc. In a brief response to the merits of the case, Mr. Sawant submitted that the appellants claimed that the suit property by Akabai Jadhav who herself had inherited the same in Inventory Proceedings No. 1211/1908. The claim of the appellants that the suit property had devolved upon them through late Akabai Jadhav who had inherited the same through the inventory proceedings had not been established since Inventory Proceedings No. 1211/1908 makes no mention of Akabai Jadhav having been given physical possession. On this basis, Mr. Sawant submits that no interference is called for and the Appeal is liable to be disposed by answering the aforesaid questions in favour of the respondents.

23. Having heard the learned Counsel for the parties, perused the record and having considered the submissions by Counsel, the question no. 1 is liable to be answered in the negative subject to the following. The relief of deletion of names of the defendants would obviously be for the Trial Court to consider failing which it was for the first Appellate Court to consider the same being the last forum on factual aspects. The fact that the first Appellate Court ought to have re-appreciated the entire evidence and given specific finding has been reiterated by

the Supreme Court in Santosh Hazari (supra), which observed that the judgment of the Appellate Court must reflect conscious application of mind and record finding with reasons on all issues alongwith the contentions put forth and pressed by the parties. While the Supreme Court observed that the Appellate Court need not re-state the effect of evidence and all the reasons given by the Trial Court and expressing general opinion on the findings given by the Trial Court would be sufficient, it cannot ignore the duty cast upon it.

24. In K. Karuppuraj (supra) it is observed that the right of a first Appeal is a valuable one and parties must have the right to be heard on law and facts and the judgment must address on all issues. In the present case that has clearly not been done. It is pertinent to note that the Appellate Court found that the relationship of the appellants and Akabai Jadhav had been admitted by the respondents. The possession with the appellants has been also admitted by the respondents. It observed in paragraph 22 that the defendants have not produced any title documents to show that they are owners of the property. The deposition of the witness has been quoted. The Trial Court concludes that the possession of the suit property was with the plaintiffs. The fact of possession not being in dispute, the first Appellate Court has answered the question in negative. The point framed was wider than the issue before the Trial Court by recording that the appellants had not proved that they were absolute owners in possession.

25. The Appellate Court held that they were not entitled to permanent injunction against peaceful possession being disturbed. While answering this point, the first Appellate Court has come to the finding that from the interim Application filed before the Trial Court, it was not evident that till 1981, the appellants were alone in the possession of the suit property.

26. In overturning the decision of the Trial Court, the first Appellate Court has observed that the respondent no. 1 had not produced convincing documentary evidence to show their title to property and while holding that the appellants must prove their title before they can seek declaration as absolute owners it has denied the benefit of possession. A finding that has not been over turned with cogent reasoning. The first Appellate Court's perception that the appellants must establish ownership prior to seeking protection of possession is clearly misconceived. It has rejected the contention of the appellant that the co-owners can file a suit on behalf of others and finding that such an argument would hold good only for injunction simpliciter and not for declaration in title. In the facts at hand and generally I find that the defence that unless all co-owners are joined as party-respondents, the appellants possession cannot be protected is not justifiable. Assuming for the sake of argument that the case was of several co-owners, some were omitted by reason of sheer inadvertence or by design and relief of injunction was sought. It would, to my mind, not justify dismissal of suit and/or not protecting possession which was admittedly with the appellants given the findings by the Trial Court and which was not subject mater of any analysis by the first Appellate Court. I am therefore in agreement with the appellants that

in the facts of the case at hand, the co-owners could maintain a suit and claim protection against dispossession once he has established the possession notwithstanding the fact that the suit is not one for injunction simpliciter. It was not necessary in my view for the appellants to succeed in obtaining a declaration as well. Declaration of ownership is clearly distinct and separate from the relief protecting possession.

27. The suit could not be said to be bad in law in its entirety. True, some parties, who were necessary, could not been joined, but would that deprive the appellants against dispossession ? The answer to this, in my view, must be in the negative. Possession being recognized as a critical aspect, the Appellate Court having found in favour of the appellants, the first Appellate Court could not have rendered the possession of the appellants vulnerable by not granting protection merely because of non-joinder or mis-joinder of parties. As long as the appellants were satisfied that they were entitled for the reliefs against the respondents, the injunction could be granted. It is always possible to grant some reliefs in a suit although some others may be declined and to that effect, I answer the question no. 2 in the negative and hold that the suit to that effect in the facts of the case could not be said to be bad in law due to non-joinder/mis-joinder of parties.

28. On the aspect of limitation, even on first principles, the apprehension expressed by the appellants of the likelihood of being dispossessed is what is material and the Trial Court after framing the issue whether the defendants prove that the suit suffers from delay and laches and is barred by law of limitation, the Trial Court found that there was no evidence whatsoever that the suit was barred and that there is no delay in filing the suit. The first Appellate Court framed point no. 3 and held that the suit was barred. It predicated its reasoning on the fact that the plaintiffs had sought deletion of names of respondents from survey records. It found that the Trial Judge had not considered the "true aspect of the matter" merely believing that cause of action arose on 27.01.1999 and thus the suit deserves to be dismissed. The first Appellate Court obviously did not realize that the appellants had sought protection against dispossession since the original defendants had admitted possession.

29. The witness on behalf of the plaintiffs had denied the suggestion that they were not in possession. Nothing had been produced on record to indicate that they were not in possession. In fact, the Appellate Court had clearly returned a finding that the plaintiffs by process of reasoning while dealing with issue nos. 1 and 3 and the additional issues, which has not been effectively discredited. The reasons for deciding point no. 3 in its current form does not find support in the reasoning by the first Appellate Court. Paragraph 23 of the order of the first Appellate Court reads thus:

23. Learned Trial Judge while answering issue of limitation has not considered the true aspect of the matter by merely believing that cause of action arose to appellants to file this suit on 27/01/1999 when in fact there is no material on

record to substantiate said cause of action. Thus, in my view suit deserves to be dismissed being barred by limitation. Hence, my findings. In view of above, the following order:

ORDER

Appeal is dismissed with costs.

Decree to be drawn up accordingly.

30. Inter alia on the basis that there is no material to support the cause of action against the dispossession can be on a mere apprehension and in this behalf the averments in the plaint in paragraph 5 read with paragraphs 15 and 17 contain statement that the defendants are not in possession of the suit property and in my view, the Trial Court has exercised its discretion in granting the protection.

31. Lastly, I find that the Appellate Court erred in observing that the execution of the sale deed dated 26.11.1983 had not been pleaded and the evidence beyond the pleadings cannot be looked into since it does not form part of the pleadings. However, it also observed since the plaint has not been amended incorporating the above facts (alluding to fresh documentary evidence) the evidence on the above subject cannot be looked into, in my view, the respondents had an opportunity of cross examining the appellants' witness. Every document which constituted evidence is not pleaded and the first Appellate Court has acted on a misconceived notion that the documentary evidence has not been pleaded.

32. The effect of the decree of the Trial Court is that the plaintiffs were found to have filed the suit within time permissible in law. The plaintiffs were found to be in possession of the suit but was not entitled to a declaration of absolute ownership since all the necessary parties were not impleaded. As a result, the deletion of the names were not permitted.

33. I must be conscious of the fact that both, the Trial Court and the Appellate Court concluded that the defendants were not exclusive owners or were in possession and it is in this admitted position that the questions are required to be considered.

34. In Santosh Hazari (supra) and K. Karuppuraj (supra), the Supreme Court had held that the Appellate Court must independently assess the evidence of all the parties and not merely record general expression of concurrence with a Trial Court's judgment. The first Appellate Court is required to give reasons independently of those with the Trial Court and the evidence should be discussed and considered in details in terms of Order 40 Rule 31 of CPC. In the case at hand, it is evident that the first Appellate Court had not considered the evidence produced and the fact that it is not necessary to plead evidence, I am in agreement with the learned Senior Counsel for the appellants that pleadings of evidence was not necessary and in fact, if both co-exists can a relevant relief be granted. To state that all documentary evidence must be a part of the pleadings would be irrational since the Code of Civil Procedure contemplates pleadings in

Orders VI, VII and VIII. The recording of evidence is not relevant at that stage. Statements and production of evidence is contemplated under Order XVIII Rule 2 of CPC, which provides that on the date fixed for hearing, the party having right to begin shall state its case and produce its evidence. (Emphasis supplied).

35. Documentary evidence need not be pleaded, but is required to be proved. It is the case of the appellants that even before the Trial Court, the respondents had not contended that the documents were beyond the pleadings and it is for the first time that the Appellate Court so held. Order XVIII of CPC contains the relevant provisions that are required. Order XVIII, Rule 4 of CPC provides how the documentary evidence can be admitted. There is no doubt that it is a cardinal rule of pleadings and in particular Order VI, Rule 2 that the pleadings must state the material fact and not the evidence by which the pleadings is to be proved. Thus, the Appellate Court has failed to consider these aspects. What was relevant in the instant case is the appellants' possession of property and that was established including by admissions of the respondents. In view of the findings that are returned in this Appeal, question no. (2) need not be answered.

36. In *Chief Conservator of Forest, Government of Andhra Pradesh*, (supra) the aspect of co-ownership of parties, who have not been impleaded is at large. In *Somnath Burman* (supra), the Supreme Court observed that it is a civil suit for possession and title.

37. In my view, the Trial Court and the Appellate Court appear to have proceeded on the basis of framing of prayers which sought an injunction consequent upon a declaration and appears to have construed the relief sought to mean that only if a declaration of title as sought is granted, the injunction could have been granted.

38. In view of the above, I find that the last question also is required to be answered in the negative. The Appellate Court was not justified in discarding documentary evidence holding that they were not mentioned in pleadings. In view thereof, the Appeal is disposed in the above terms and I proceed to pass the following order:

ORDER

(a) Regular Civil Suit No. 17/1999/C is restored to the file of the Trial Court.

(b) There will be interim injunction in terms of prayer clause (c) of the plaint, inasmuch as the respondents are restrained from interfering with the possession and enjoyment of the suit property by the plaintiffs.

(c) The Trial Court shall hear the parties afresh. However, no further evidence shall be permitted to be led.

(d) Parties to appear before the Trial Court on 8th June 2022 when the Trial Court will pass appropriate directions of the conduct of the suit.

39. The Appeal is disposed in above terms.