

(2013) 07 BOM CK 0063

In the Bombay High Court

Case No : Second Appeal No. 36 of 2004

Yoshita R. Rivankar and Others

APPELLANT

Vs

Mrs. Sunita Haldankar and Others

RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Citation : (2013) 5 ABR 452 : (2013) 6 ALLMR 600 : (2013) 5 BomCR 523 :
(2014) 4 MhLj 463

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

Bench : Single Bench

Advocate : R.G. Ramani, for the Appellant; C.A. Coutinho and V. Dukle, for the Respondent

Judgement

A.P. Lavande, J.—By this Second Appeal, the appellants take exception to the judgment and decree dated 8th December, 2003 passed by Additional District Judge, FTC, South Goa, Margao in Regular Civil Appeal No. 158/2001 by which the appeal preferred by the appellants against the judgment and decree dated 27th September, 2001 passed by learned Civil Judge, Junior Division, Margao in Regular Civil Suit No. 14/1978/C, has been dismissed. The appellant Nos. 1 to 10 are legal representatives of original plaintiff Vaicunta Anant Bandodkar and appellant No. 11 was plaintiff No. 2 in the above suit. The respondents are legal representatives of original defendants i.e. Shankar Anant Bandodkar, and his wife Sogunabai Shankar Bandodkar. The plaintiff No. 1 was brother of defendant No. 1.

2. The parties shall hereinafter be referred to as per their status before the trial Court.

3. The plaintiffs filed the above suit seeking recovery of possession of suit premises situated at Aquem-Alto claiming title to it by deed of purchase dated 19th March, 1943. The property consisted of chawl with four blocks and after purchase, the plaintiff No. 1 built a big and a small room annexed to the house. It was the case of the plaintiffs that plaintiff No. 1 permitted defendant No. 1 to

reside gratuitously and about 10 years back, the defendants started residing separately in one block and in another block defendants were tying catties. It was further the case of the plaintiffs that somewhere in the year 1977, Defendant No. 1 made an application to Margao Municipal Council claiming that house in question was belonging to him. Aggrieved by action of defendant No. 1, the plaintiffs filed above suit seeking recovery of possession of the suit premises which was in possession of the defendants and also sought mesne profit.

4. The suit was contested by the original defendants by filing Written Statement. The defendants claimed that they were in possession of three blocks on the western side. In so far as the sale-deed is concerned, it was the case of the defendants that suit property was owned by Raghunath Raikar, who was related to Defendant No. 1 as brother-in-law being cousin of Defendant No. 2. According to the defendants, Shri. Raghunath Raikar, who had started his business of goldsmith in Bombay, suffered losses and as such, required money and hence requested Defendant No. 1 for assistance with a proposal to sell suit property to the Defendant No. 1. At the relevant time, Defendant No. 1 was the only earning member of the joint family of plaintiff No. 1 and the defendants. Defendant No. 1 agreed to purchase the suit property. However, Defendant No. 1 was suffering from typhoid as such, he could not move out of his house for executing the sale deed and since Mr. Raikar required money urgently, considering the good relations with plaintiff No. 1, asked him to execute sale deed in the name of plaintiff No. 1 and accordingly, sale deed was executed in favour of plaintiff No. 1. It was further case of the defendants that one small and one big room was constructed by defendant No. 1.

5. In the suit, the trial Court framed following issues:--

1. Whether the plaintiffs prove that they plaintiff No. 1 purchased the property known as 1/2 of South Naicalem or (trigessimo oitavo lote) with a house thereon, situated at Aquem Margao?

2. Whether the plaintiffs prove that after the purchase, the plaintiff No. 1 built a big and a small room annexed to the house?

3. Whether the plaintiffs prove that the plaintiff No. 1 permitted the defendant No. 1 to reside gratuitously?

4. Whether the plaintiffs prove that in the month of November, 1977 the plaintiff No. 1 found that the defendant No. 1 entered his name in the roll of house tax without the consent of the plaintiffs and the same were given numbers as house Nos. 17 and 18?

5. Whether the plaintiffs prove that they are entitled for mesne profits?

6. Whether the defendants prove that the property of 1/2 of South Naicalem or Palmar Bernardo Francisco de Costa, first adicao (trigessimo oitavo lote) was purchased by the defendants by paying money equivalent of its purchase price when Roghunath Raikar suffered losses and to save his business, came to the

defendant No. 1 for seeking assistance of money with the proposal to sell the said property to the defendants?

7. Whether the defendants prove that in the year 1943 the defendant No. 1 was the only earning member of the joint family and that the plaintiff No. 1 was about 24 years and that he was made partner by defendant No. 1 in the business of goldsmithing?

8. Whether the defendants prove that at the time of deed of purchase the defendant No. 1 was sick with typhoid and he could not move out of his house for executing the sale-deed and that since Raikar required money urgently he asked Shri Raikar to execute the sale-deed in the name of plaintiff No. 1?

6. In the above suit, plaintiffs examined four witnesses namely PW 1 Late Vaicunta, PW 2 Subhash Karmali, PW 3 Anand Shirodkar and PW 4 Ramanand Bandodkar. The plaintiffs also produced sale-deed executed in the year 1943. The defendants led evidence of five witnesses namely DW 1 Arun Bandodkar, DW 2 Madhav Bandodkar, DW 3 Tanaji Patil, DW 4 Sunil Wadekar and DW 5 Caetano Fernandes.

7. The trial Court held that plaintiffs have proved title to the suit property. The trial Court further held that plaintiffs have proved that plaintiff No. 1 had built blocks but not proved that when they were constructed. The trial Court held that plaintiffs had not proved that plaintiff No. 1 permitted defendants to reside gratuitously. Prayer for mesne profit was rejected by the trial Court. All the issues in respect of which burden of proving was on the defendants were answered against the defendants.

8. The plaintiffs preferred an appeal to the District Court, South Goa, Margao. Learned Additional District Judge, who dealt with the appeal, framed only one point for determination, namely do the plaintiffs prove that plaintiff No. 1 permitted defendant No. 1 to reside gratuitously/permissively?

The lower appellate Court answered the point for determination against the appellants/plaintiffs. Hence, the present Second Appeal.

9. Second Appeal was admitted on 8th April, 2004 on the following substantial questions of law:--

a. Whether the trial Court below, despite finding concurrently that the plaintiffs were the owners of the suit property and that the defendants had not established that the defendant No. 1 was the owner of the suit property by adverse possession, were justified in refusing to grant the relief of possession to the plaintiffs in respect of part of the suit property found to be in defendants' possession when the defendants had failed to show what right they had to continue to be in possession thereof?

b. Whether the finding of the learned Courts below that the plaintiffs had failed to establish that the defendants were occupying the suit property with the

permission of the plaintiff No. 1 is perverse more so when both the learned Courts below concurrently found that the plaintiffs were the owners of the suit property and the defendants had not established that the defendant No. 1 was the owner of the suit property by adverse possession?

c. Whether after concurrently finding that the plaintiffs were the owners of the suit property and that the defendants had not established that the defendant No. 1 was the owner of the suit property by adverse possession, the learned Courts below were justified in refusing to the plaintiffs the relief of possession for the reason that the plaintiffs had failed to establish that the defendants were occupying the suit property with the permission of the plaintiff No. 1?

10. Mr. Ramani, learned counsel appearing on behalf of the appellants submitted that the lower appellate Court wrongly framed the point for determination. Learned counsel further submitted that the trial Court, having recorded the finding of title in respect of suit property in favour of the plaintiffs, could not have dismissed the suit for recovery of possession and consequently, the lower appellate Court ought to have addressed itself to the question as to whether plaintiffs having title to the suit property, could not have been non-suited solely on the ground that the plaintiffs had not proved that they had permitted defendant No. 1 to occupy the premises gratuitously. Learned counsel further submitted that the trial Court as well as the lower appellate Court after having recorded the finding in favour of the plaintiffs regarding title in respect of suit property and having negated the claim of the defendants to the suit property by way of adverse possession, could not have non-suited the plaintiffs. Learned counsel further submitted that the trial court had answered all the issues of which burden of proving was on the defendants, against the defendants and the defendants having neither filed cross objection nor argued before the lower appellate Court that the findings given by the trial Court in respect of said issues were unsustainable in law, cannot now urge to contend that the findings on these issues, are patently unsustainable in law since they have reached finality. The defendants, having failed to prove adverse possession, the necessary sequitur is that both the Courts below ought to have decreed the suit for possession in view of Article 65 of Limitation Act. Learned counsel further submitted that the defendants having failed to prove that they had any title to the suit property or no part thereof and the finding to that effect having been tendered concurrently by both the Courts below the plaintiffs are entitled to recovery of possession of the premises in possession of the defendants. In support of his submissions learned counsel relied upon judgment in the case of Indira Vs. Arumugam and Another, .

11. Per contra, Mr. Coutinho, learned counsel appearing on behalf of Respondent Nos. 1, 2, 4, 6, 7, 11 to 13 and 15 submitted that the trial Court and lower appellate Court have rightly recorded a finding that the plaintiffs have failed to prove that plaintiff No. 1 had allowed defendant No. 1 to occupy part of the suit premises gratuitously. Inviting my attention to the cross-examination of PW 1,

Mr. Coutinho submitted that PW 1 had clearly admitted that the defendants were occupying three blocks and possession of two blocks were taken by defendants in the year 1975 or 76. He invited my attention to the statement made by PW 1 in his cross-examination in which it has been stated that one block occupied by all of us (Narcinva, plaintiffs and defendants), was obtained on lease by me (referring to plaintiff No. 1) defendant No. 1 and his brother Narcinva. Learned counsel, therefore, submitted that the case of the plaintiffs that plaintiff No. 1 had permitted defendant No. 1 to occupy part of the suit premises gratuitously, is completely belied in view of the admission of PW 1 in the cross-examination. Learned counsel further submitted that although there is no specific pleadings regarding joint tenancy in favour of the plaintiff No. 1, defendant No. 1 and Narcinva in respect of the suit property, this fact has to be taken into consideration while considering whether the plaintiffs are entitled for the reliefs sought in the Plaint. In support of his submissions, Mr. Coutinho, placed reliance upon Division Bench judgment of this court in the case of Appa Babaji Misal Patil and others Vs. Dagdu Chandru Misal, since deceased by his heirs Naginbai Dagadu Misal etc. etc. and others, .

12. Mr. Dukle, learned counsel for respondent Nos. 8 and 9 submitted that both the Courts have rightly dismissed the suit on the ground that the plaintiffs have failed to prove that plaintiff No. 1 had permitted defendant No. 1 to occupy part of the suit premises gratuitously. He further submitted that defendant No. 1, plaintiff No. 1 and Narcinva were in occupation of one block as tenants and, therefore, the plaintiffs are not entitled to recovery of possession of premises in possession of defendant No. 1. Learned counsel further submitted that once tenancy in respect of one block in favour of defendant No. 1 is admitted, there is presumption of continuance of tenancy and, as such, the defendants cannot be evicted from the suit premises in view of the provisions of Goa Daman and Diu Buildings (Lease, Rent & Eviction) Control Act, 1968. Placing reliance upon Order VII, Rule 7 of Civil Procedure Code, learned counsel submitted that in spite of the fact that no specific plea has been taken regarding tenancy of one block in the suit property, yet in view of the admission of tenancy by plaintiff No. 1, the plaintiffs are not entitled to the relief of recovery of possession. Learned counsel further submitted that the plaintiffs have not identified the one block in respect of which tenancy was created in favour of plaintiff No. 1, defendant No. 1 and Narcinva and as such, in the absence of any identification of said block by the plaintiffs, the plaintiffs are not entitled for recovery of possession of premises in possession of the defendants. Learned counsel further submitted that the admission given by plaintiff No. 1 in his cross-examination has to be considered independently even in the absence of specific plea on the part of the defendants. Learned counsel further submitted that there are concurrent findings given by both the Courts below and both the Courts below in their discretion have chosen to dismiss the suit and, as such, it would not be proper exercise for this Court to exercise jurisdiction u/s 100 of C.P.C. to set aside decrees passed by both the Courts below. Learned counsel further submitted that the findings given by both

the Courts below against the defendants in respect of issues of which burden of proving was on the defendants, have been wrongly given by the trial Court and maintained by lower appellate Court and the respondents in Second Appeal are entitled to urge that the said findings are patently unsustainable in law. Learned counsel lastly submitted that no case has been made out for interference with the decrees passed by both the courts below dismissing the suit filed by the plaintiffs. In support of his submissions, Mr. Dukle placed reliance upon following judgments:--

- i. Munshi Dass Vs. Mal Singh and Mal Dass and Others, .
- ii. Joseph John Peter Sandy Vs. Veronica Thomas Rajkumar and Another, .
- iii. Ramesh Kumar Vs. Kesho Ram, .
- iv. Sasikala v. Wilson D. Doss, 2012 (1) CCC 576 (Mad).
- v. Reserve Bank of India and Another Vs. Ramkrishna Govind Morey, .
- vi. Morto Manohar Agashikar v. Sham sunder P. Naik, 1989 (1) Goa Law Times, 327.

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

14. The main argument advanced by Mr. Ramani on behalf of the appellants is that both the Courts below having recorded a finding of title in favour of appellants/plaintiffs, could not have non-suited the plaintiffs and ought to have granted decree of recovery of possession of the premises in possession of the defendants. Though it was argued on behalf of respondent Nos. 8 and 9 that the respondents are entitled to challenge the findings against the respondents in the present Second Appeal, I find it extremely difficult to accept the submission made inasmuch as none of the respondents in the First Appeal urged before the lower appellate Court that finding of title in favour of appellants/plaintiffs was unsustainable in law. The respondents/defendants neither filed cross-objections nor urged before the first appellate Court that the finding of title in favour of the plaintiffs was unsustainable in law. Therefore, in my view, the said finding has become final and is not liable to be disturbed at the instance of respondents/defendants in the Second Appeal preferred by the appellants/plaintiffs. Heavy reliance has been placed on behalf of the respondents on so called admissions given in the cross-examination of PW 1 Vaicunta Bandodkar. In the cross-examination, he stated as under "the said one block occupied by all of us was obtained on lease by me, defendant No. 1 and brother Narcinva." On the basis of above statement, it was argued that even if it is assumed that plaintiffs had title to the suit property in terms of sale-deed executed in the year 1943 in favour of plaintiff No. 1, yet the defendants have proved their title by way of lease in respect of one block in possession of the defendants. I am unable to accept the submission made on behalf of the defendants. Firstly, the defendants in the written statement did not claim tenancy in respect of the premises in their

possession or any part thereof. Reliance placed by Mr. Coutinho on the judgment of Division Bench of this Court in the case of Appa Babaji Misal Patil and others Vs. Dagdu Chandru Misal, since deceased by his heirs Naginbai Dagadu Misal etc. etc. and others, is totally misplaced. In the said case, the Division Bench has held that evidence given by the plaintiffs that partition was effected prior to year 1914 between the branches of two parties, ought to have been considered, though the same was not pleaded in the plaint. In the said case, the defendants were relying upon the evidence given by the plaintiff though in the absence of any specific pleadings. In the present case, as stated above, the defendants have not pleaded that they had right to be in possession of one block in the suit property by virtue of lease in favour of plaintiff No. 1, defendant No. 1 and Narcinva. Moreover, it is pertinent to note that plaintiff No. 1 acquired title to the suit property in the year 1943 in terms of the sale-deed executed. It is not even the case of the defendants in their evidence that thereafter they continued to be in possession of one block as tenants. If in case the defendants also were in possession of one block in the suit premises as tenants they were bound to pay rent to the landlord. There is not even a whisper in the cross-examination of plaintiff No. 1 or in the evidence led by defendants in this regard. Reliance placed on behalf of defendant/respondent Nos. 8 and 9 on the judgment of *Morto Agashikar* (supra), is totally misplaced. In the said case, the appellant had claimed that premises let out to the respondent, were surrendered by him whereas the case of defendant was that he was forcibly dispossessed. In this factual background and having regard to the provisions of Transfer of Property Act, learned single Judge held that there is prohibition of eviction of tenants and theory of surrender of tenancy or lease must be proved by advancing it and that there is presumption that tenancy continued. In my considered view, the judgment in the said case does not advance the case of the respondent Nos. 8 and 9. In my considered view, Mr. Ramani is justified in placing reliance upon the judgment of the Apex Court in the case of *Indira Vs. Arumugam and Another*, . In the said case, the Apex Court held that the suit for possession of immovable property based on title is covered by Article 65 of the Limitation Act. The Apex Court held that once title of the plaintiff is established, unless defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. In the present case, the claim of adverse possession as set up by defendants has been negated. Therefore, the suit filed on the basis of title is covered by Article 65 of the Limitation Act, 1963 and, as such, the suit filed in the year 1978 for recovery of possession, is very much maintainable.

15. Coming to the submission made by Mr. Dukle on the basis of Order VII, Rule 7 of C.P.C., I find no merit therein. Order VII, Rule 7 of C.P.C. provides that every plaint shall specifically state the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for and the same rule shall apply to any relief claimed by the defendant in his written statement. I fail to understand as to how Order VII, Rule

7 of C.P.C. advances the case of respondent Nos. 8 and 9.

16. No doubt, both the Courts have concurrently held against the appellants/ plaintiffs, but it is pertinent to note that both the Courts below recorded a finding of title in respect of the suit property in favour of the plaintiffs and have non-suited the plaintiffs on the sole ground that the plaintiffs have not been able to prove permissive user of the premises of the three blocks in possession of the defendants. In my view, both the Courts have fallen in error. Once the title of the property in the suit property is proved unless the defendants set up a better title, the plaintiffs cannot be non-suited, therefore, in my view, the ground on which the plaintiffs have been non-suited by both the Courts below, is patently unsustainable in law.

17. In my considered view, the plaintiffs having proved the title in the suit property both the Courts could not have non-suited the plaintiffs after holding that the defendants also have not proved better title.

18. In my opinion, the judgments relied upon by Mr. Duple, do not advance the case of respondent Nos. 8 and 9. However, since they have been relied upon, I deem it appropriate to refer to them.

19. In the case of *Munshi Dass Vs. Mal Singh and Mal Dass and Others*, , the Apex Court held that since the facts stated in paragraphs 10 and 12 of the plaint regarding the custom were denied in the written statement, the plaintiffs had to prove the custom by cogent and reliable evidence.

20. In the case of *Joseph Sandy (supra)* the Apex Court held that omission to make specific allegations regarding undue influence is not the ground to refuse the relief provided, there is no surprise to the defendant.

21. In the case of *Sasikala (supra)*, the learned single Judge of Madras High Court has held that tenancy created by life interest holder does not come to an end on his death and attornment of tenancy in favour of subsequent purchaser of property is automatic and the tenant is not required to approach subsequent purchaser for attornment of property.

22. In the case of *Reserve Bank of India (supra)*, the Apex Court held that High Court has no jurisdiction in Second Appeal to interfere with the order passed by the trial Court in its discretion which was upheld by lower appellate Court. There can be no dispute with the proposition. However, when the findings recorded by trial Court which are confirmed by appellate Court are patently unsustainable in law, it is well settled that the same are liable to be interfered with by this Court in exercise of its jurisdiction u/s 100 of C.P.C.

23. In view of the above discussion, I am of the considered opinion that both the Courts below have erred in dismissing the suit in so far as prayer (a) is concerned. In so far as prayer (b) regarding mesne profit is concerned, no substantial question of law has been framed in this regard and as such, I am not inclined to grant prayer (b).

24. For the reasons aforesaid, the substantial questions of law framed, are answered in favour of appellants.

25. In the result therefore, Second Appeal is partly allowed. Judgment and decree dated 8th December, 2003 passed by Additional District Judge, South Goa in Regular Civil Appeal No. 158/2001 and judgment and decree dated 27th September, 2001 passed in Regular Civil Suit No. 14/1978/C passed by Civil Judge, Junior Division, Margao to the extent they refuse prayer clause (a) of the plaint, are quashed and set aside and the suit is decreed in terms of prayer clause (a) which reads thus:--

The defendants be directed to quit, vacate and hand over the possession of the premises entered as for the purpose of tax as the house Nos. 17 and 18 or from any portion of premises situated in the property known as 1/2 of South Naicalem or Palmar Bernardo Francisco de Costa primeiro adicao, (trigessino oitavo lote situated at Aquem Alto, Margao.

26. The respondents/defendants are granted time of three months to hand over the possession of the premises in their possession to the appellants/plaintiffs. The appeal is disposed of in aforesaid terms with no order as to costs.