



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 18 OF 1994

Ram s/o Lachhama Goralwad
age 39 years, occ. Agril
r/o Mukhed, Dist. Nanded. .. Appellant

versus

Sambha s/o Gangaram Goralwad
age 66 years, occ. Agril.,
r/o Mukhed, Dist. Nanded. .. Respondent

Ms. P. S. Talekar, Advocate for the Appellant.
Mr. P. G. Godhamgaonkar, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.

RESERVED ON : 6th JANUARY, 2025.

PRONOUNCED ON : 17th JANUARY, 2025.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the concurrent findings recorded by the Trial Court and First Appellate Court in Regular Civil Suit No. 81/1987 decided on 31.12.1988 and confirmation of the said order in Regular Civil Appeal no. 103/1993 (Old No. 10/1989) decided on 23.12.1993. The learned Trial Court decreed the suit filed by Plaintiff declaring his ownership in respect of the suit property.

2. Parties are referred to as Plaintiff and Defendant for the sake of convenience.

3. At the time of admission of appeal, it was observed that substantial question of law with reference to registered sale-deeds on the point of identity of the suit plot is involved in the appeal.

4. On appreciation of material on record, following substantial questions of law arose for determination :-

- (i) Whether Trial Court erred to cast burden on Defendant instead of Plaintiff to prove his case ?
- (ii) Whether both Courts below recorded findings in ignorance of pleadings and evidence led before Trial Court and the findings so recorded are perverse ?

Both the parties being fully aware of these substantial questions of law, made their respective submissions.

5. In order to appreciate the submissions of rival parties, it is necessary to take into consideration the pleadings and evidence led before the Trial Court. Plaintiff filed suit with the contention that he is the owner and in possession of suit plot on the basis of registered

sale-deed dated 04.10.1966. He claims that though Defendant has no right, title or interest over the suit plot, interference has been caused into his possession. It is averred by Plaintiff that Defendant had filed earlier suit bearing Regular Civil Suit No. 58/1984 wherein it was specifically stated that plot of Plaintiff is to the West of his plot. It is claimed by Plaintiff that Defendant had published a proclamation in newspaper on 11.05.1987 and disclosed his intentions. Plaintiff claims that he was forcefully dispossessed from the suit plot after interference into his peaceful possession over the same was caused by Defendant. Thus, though the suit was initially filed for declaration and injunction, subsequently, recovery of possession of plot is sought.

6. Defendant contested the suit by filing written statement at Exhibit 18. Defendant denied the contentions of Plaintiff. It is his case that Plaintiff has purchased the suit plot from Mehboob Chand vide registered sale-deed dated 04.10.1966 in which there is recital to the effect that plot of Madhav is to the East of Plaintiff's plot and Maruti s/o Sambhaji's plot is to the West of Plaintiff's plot. It is his case that Plaintiff's plot has been acquired for the purpose of market road and that Plaintiff is neither owner nor in possession of the suit

plot. He claims that by mistake he had shown the position/situation of plot of Plaintiff in Regular Civil Suit no. 58/1984. It is claimed that merely because of said mistake Plaintiff cannot claim any right over the suit plot. It is the case of Defendant that the suit plot is purchased by him in the name of Madhav, his brother, from joint family funds. After death of Madhav, he became owner of the suit plot. He also relied upon the recitals in the sale-deed of Maruti dated 07.11.1984 to indicate the situation of the plots. With these amongst other contentions, Defendant sought dismissal of the suit.

7. Learned Trial Court framed issues at Exhibit 29. Plaintiff examined himself and also led evidence of three witnesses. Defendant also examined himself and took support of evidence of six witnesses. Both sides placed reliance on documentary evidence too. Learned Trial Court, after hearing both sides, passed judgment and decree dated 31.12.1988 declaring that Plaintiff is the owner and was in possession of the suit plot and directed Defendant to handover vacant possession of the suit plot to the Plaintiff. This judgment and decree passed by the Trial Court was assailed unsuccessfully in Regular Civil Appeal No. 103/1993.

8. Learned counsel for Defendant submits that both the Courts below have failed to take into consideration the documentary evidence as well as admission of Plaintiff on record which indicate the exact situation of the suit plot and plot of Plaintiff. It is her submission that Defendant had filed suit against Kusumbai and hence evidence of husband of Kusumbai cannot be considered as evidence of independent witness as he is interested in deposing against the Defendant. It is her submission that the plot of Plaintiff has been acquired in the year 1971 and to substantiate the said contention, Defendant has placed on record copy of award indicating such acquisition. She further argues that only on the ground that Defendant in his previous suit has given incorrect boundaries of his plot, Plaintiff cannot be permitted to take advantage of the same, moreover when the Defendant has explained the same in written statement and evidence. In any case, according to her, the said suit was not decided on merit and the same came to be withdrawn by Defendant herein. She also argued that learned Trial Court has wrongly cast burden upon the Defendant instead of initial burden being cast on Plaintiff to prove his case. It is submitted that without framing issue with regard to estoppel, learned Trial Court had decreed the suit and hence application was moved before the First

Appellate court under Order 41 Rule 25 of Code of Civil Procedure for framing additional issues and relegating the matter back to the Trial Court for decision afresh. It is her submission that the said application came to be rejected erroneously by the First Appellate Court. Thus, it is her contention that these issues are required to be framed and the Trial Court needs to be called upon to record findings thereon. To support her submissions, she placed reliance on judgment of Hon'ble Supreme Court in case of Union of India and others vs. Vasavi Cooperative Housing Society Limited and others, (2014) 2 Supreme Court Cases 269.

9. Learned counsel for Plaintiff supported the impugned judgments on the ground that there is concurrent recording of finding of facts by both the Courts below and in exercise of jurisdiction under Section 100 of Code of Civil Procedure, it is not permissible to cause interference therein. It is his further submission that there is nothing on record to indicate that the plot belonging to Plaintiff was ever acquired. It is submitted that perusal of the said award placed on record by Defendant shows that it has been passed in respect of property belonging to erstwhile owner. He argued that once Defendant has claimed before the Court of law in

earlier suit position (situation) of his plot, and unless he satisfactorily explains the same to be a mistake, it is not permissible for him to take different stand. Attention of the Court is drawn to the evidence of Defendant wherein according to him Defendant does not explain the reason for incorrect plot being shown in Regular Civil Suit No. 58/1984. It is his contention that the only defence of Defendant is about acquisition of plot of Plaintiff and since the same has not been proved the findings recorded by the Trial Court and confirmed by First Appellate Court cannot be interfered with. Finally he submits that there is no counter claim filed by Defendant claiming himself to be the owner of the suit property and hence question of framing of issues as now sought does not arise. It is contended that in any case, parties were fully conversant with the issues involved in the suit and as such this is not a fit case for even relegating the matter back to the trial Court.

10. Though not for purpose of re-appreciation, but to ascertain the perversity of findings, if any, recorded by Courts below, for limited purpose, the evidence on record is considered. There is no dispute about the fact that the plots originally belonged to Mehboob Chand are sold to three different persons i.e. Plaintiff, Madhav and

Maruti. These plots are abutting to each other. Plaintiff has filed suit on the basis of title and possession over suit plot. Plaintiff claims to be the possessor of suit plot on the basis of registered sale-deed bearing No. 2207 dated 04.10.1966. He, also gives description of the boundaries of the suit plot. His case solely depends upon the suit filed by Defendant bearing Regular Civil Suit No. 58/1984 wherein he had mentioned the boundaries of the suit plot i.e. to the West plot of present Plaintiff. The suit is filed with averment that Defendant is trying to dispose of the suit property by creating false documents and public notice was issued and obstruction is also claimed. During pendency of the suit, it is claimed that Defendant has dispossessed him from the suit plot and hence decree of recovery of possession and injunction is sought.

11. As against this, Defendant has placed reliance upon the registered sale-deeds executed at different times by erstwhile owner in favour of Plaintiff, Madhav (inherited by Defendant) and Maruti. The boundaries shown in the sale-deed of Plaintiff and the boundaries mentioned in other two sale-deeds are relied upon in order to substantiate his case that suit property does not belong to Plaintiff. It is also claimed that ownership of Plaintiff over the suit

plot was never admitted. It is specifically stated in the written statement that in the suit filed against Kusumbai the boundaries of the suit plot therein was wrongly and mistakenly shown. After framing of issues both parties led evidence. Perusal of their evidence indicates that evidence was led in order to prove their respective contentions. Meaning thereby, parties were conscious of the issues involved in the suit. This Court, therefore, finds no substance in the contention of learned counsel for the Defendant that the issues were not properly framed and as such the provisions of Order 41 Rule 25 of Code of Civil Procedure need to be invoked. Rejection of application for framing issues under these provisions by the First Appellate Court cannot be faulted with.

12. This Court is conscious of the fact that it is not permissible for the Court to re-appreciate the evidence and record any independent findings on facts. The position of law however is also settled to say that if the findings recorded by Courts below are inconsistent to evidence on record and therefore perverse, same can be certainly interfered with. One more question arises here is as to whether it was open for the learned Trial Court to accept oral evidence over documentary evidence which is in the form of

registered sale-deeds. Secondly, whether it can be said that Defendant has explained the statement made in Regular Civil Suit No. 58/1984 and it does not become estoppel for him. Thus, these are additional substantial questions of law involved in this appeal, as indicated in earlier part of judgment.

13. Plaintiff filed suit claiming to be owner of the suit plot and description is also provided of boundaries therein. His case depends upon the sale-deed dated 04.10.1966 (Exhibit 49) executed by the erstwhile owner in his favour. The said sale-deeds in favour of Plaintiff (Exhibit 49), Defendant (through Madhav) (Exhibit 68), Maroti (Exhibit 75) and Dhonduram (executed by Maruti) (Exhibit 71) are duly proved. These sale-deeds depict the position of the plots of these parties as follows :-

Exhibit 49 (Sale-deed dated 04.10.1966 in favour of Plaintiff, Sambha)

पुर्वेस माधव पिता लचमा यास विकलेला हिस्सा

पश्चिमेस मारोती संभाजी यास विकलेला हिस्सा

उत्तरेस रस्ता

दक्षिणेस सदरील सर्वे नंबर पैकी माझा हिस्सा

Exhibit 68 (Sale-deed dated 04.10.1966 in favour of Madhav (now Defendant))

पुर्वेस विठ्ठल नारायण यास विकलेला हिस्सा
पश्चिमेस संभा पिता गंगाराम यास विकलेला हिस्सा
उत्तरेस रस्ता
दक्षिणेस या सर्वे नंबर पैकी माझा हिस्सा

Exhibit 75(Sale-deed dated 04.10.1966 in favour of Maroti)

पुर्वेस संभा पिता गंगाराम यास विकलेला हिस्सा
पश्चिमेस सायन्ना पिता नागा यास विकलेला हिस्सा
उत्तरेस रस्ता
दक्षिणेस सदरील सर्वे नंबर पैकी माझा हिस्सा

Exhibit 71(Sale-deed dated 07.11.1984 by Maroti in favour of Dhonduram)

पुर्वेस रस्ता
पश्चिमेस सायन्ना पि. नागा यांची जागा
दक्षिणेस सखाराम पि. नागोराव मेथे यांचे पडित घर
उत्तरेस मुखेड-नरसी रस्ता

14. The documentary evidence on record, i.e. sale-deeds Exhibit 49, 68 and 75, therefore, unerringly show that the plot of Plaintiff is towards East of Defendant and West of Maroti (now Dhonduram). Similarly, in sale-deed (Exhibit 71) executed on 07.11.1984, towards East side of plot of Maroti, road is shown, which

is in consonance with stand of Defendant that the plot of Plaintiff is acquired for market road.

15. It is not the case of Plaintiff that Maroti Sambha has shown incorrect boundaries in his sale-deed executed in favour of Dhonduram. Moreover, when he admits in cross-examination that Maroti Sambha is husband of his sister, no such scope exists for showing wrong boundaries. Apart from this, there is further candid admission that boundaries mentioned in claim clause are correct. Thus, there is no reason to discard the boundaries mentioned in his sale-deed. The evidence on record therefore shows that the plot of Plaintiff was towards East side of Maroti Sambha and after the construction of road therein, the road is shown towards East side.

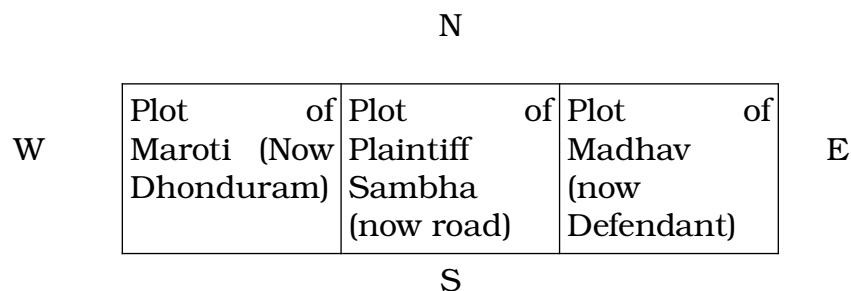
16. As against this, documentary evidence, the oral evidence led by Plaintiff is not worthy of credit. Plaintiff in his evidence at Exhibit 46, has claimed that to the East side of the plot of Madhav (now Plaintiff) is situated and towards West there is a road. This evidence is contrary to document of sale-deed (Exhibit 49) of Plaintiff himself. So also it is not in consonance with other sale-deeds on record. Further, in cross-examination he admits that to western side

of Maroti Sambha's plot, his plot is there. He also admits that plot of Vitthal Narayan is situated to the East side of plot of Defendant.

17. The evidence led by Plaintiff needs to be considered in the context of the boundaries given by Plaintiff in the suit. The same is reproduced below :-

East : Open plot of Madahv Lachma.
West : Market road then plot of Maroti Sambhaji
South : House of Sou Kusumbai w/o Nivrattirao.
North : Mukhed-Narsi road.

With these pleadings, there is unequivocal admission that the boundaries above referred are correct. The entire evidence on record thus indicates that the Plaintiff's plot is between Defendant and Maroti's plots. This can be indicated by :



There is no doubt that the plot claimed by Plaintiff belongs to Defendant, as seen from evidence on record.

18. Thus, Plaintiff has failed to discharge initial burden on him to prove his case and to shift onus on Defendant to substantiate his defence. Section 101 of Evidence Act, requires a person who desires the Court to give judgment as to his rights on the existence of the fact must prove that those facts exist. Similarly, according to Section 102, the burden of proof in a suit lies on that person who would fail if no evidence were given at all on either side. Thus, the burden to prove the case is cast upon Plaintiff and only when he gives the evidence to support a prima facie case, onus shifts upon Defendant to adduce evidence in rebuttal to meet case of Plaintiff. Thus, Trial Court has erred to cast burden on Defendant, when even there was no evidence enough to shift onus on Defendant to substantiate his defence.

19. As far as case of Plaintiff about Defendant being estopped from claiming suit plot on the basis of description of his plot given in Regular Civil Suit No. 58/1984 is concerned, the same would not become estoppel, provided Defendant explains the same. In this regard, reference can be made to judgment in case of Nagubai Ammal and others vs. B. Shama Rao and others, **1956 Supreme Court 593** wherein it has been observed thus :-

“18. An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.....”

20. Here in this case, Defendant has pleaded in the written statement that the property mentioned therein was wrong. In his evidence before the Trial Court he states that he had filed suit against Kusumbai bearing Regular Civil Suit no. 58/1984 and the said suit was withdrawn. There is no cross-examination forthcoming from Plaintiff on this evidence. On the contrary, during cross-examination in answer to question, Defendant states that the suit filed against Kusumbai was incorrect. By pleadings in the written statement and evidence led before Trial Court, Defendant has sufficiently explained the mention of wrong/incorrect boundaries in the previous suit and as such it would not act as estoppel against him.

21. On the point of claim of dispossession of Plaintiff from the suit plot is concerned, there is no specific pleading to show the exact or even approximate date of dispossession. Neither there is pleading to that effect nor evidence to indicate when such dispossession is caused. Plaintiff's evidence as well as evidence of PW 3 Nivrutti Vishwanath (husband of Kusumbai) does not establish the factum of dispossession. Evidence of Nivrutti, deserves to be kept out of consideration as he has interest to depose against Defendant who had filed suit against his wife earlier, though it was withdrawn subsequently. It is also material to consider admission of Plaintiff in his cross-examination, that he has not paid taxes of suit plot, his name is not recorded as owner, no entry in 7/12 extracts. These admissions show that Plaintiff has no evidence to claim the ownership and possession of suit plot or nexus with the same.

22. As far as claim of Defendant that the plot of Plaintiff is acquired for market road gets proved by the evidence on record and more particularly sale deed executed by Maroti Sambh (husband of sister of Plaintiff) in favour of Dhonduram, in 1984. The Defendant was not required to prove his case beyond this. The evidence on record makes his case probable.

23. Both Trial Court, as well as Appellate court committed serious error in recording findings by ignoring material evidence on record. The findings of these Courts being contrary to the evidence, are held to be perverse. The substantial questions of law therefore stand answered in affirmative. Thus, appeal succeeds. Impugned judgment and decree passed in Regular Civil Suit No. 81/1987 stands set aside. Regular Civil Suit No. 81/1987 stands dismissed.

(R. M. JOSHI)
Judge

dyb