

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 505 OF 2015****WITH****CIVIL APPLICATION NO.1077 OF 2015****IN****SECOND APPEAL NO. 505 OF 2015**

**1. Janardhan @ Shivaji Tanaji Divade,
Age 50 Years, Occupation : Agriculturist,**

**2. Narayan Tanaji Divade,
Age 40 Years, Occupation : Agriculturist,**

**Both residing at Ganeshwadi (Sartale),
Taluka Jawali, District Sarata.**

..... Appellants**...VERSUS...**

**1. Pandurang Anandrao Shinde,
Age 29 Years, Occupation : Agriculturist,**

**2. Gangubai @ Mangal Ramchandra Shinde,
Age 60 Years, Occupation : Agriculturist,**

**Both residing at Ganeshwadi (Sartale),
Taluka Jawali, District Sarata.**

..... Respondents

Mr.Nikhil Wadikar, i/b. Mr.Nandu Pawar for the Appellants.

Mr.Pradeep Gole for Respondent Nos. 1 and 2.

CORAM : R.D. DHANUKA, J.**DATED : 3rd DECEMBER, 2015**

ORAL JUDGMENT :-

By this second appeal, the appellants (original defendants) have impugned the order and judgment dated 10th March, 2015 passed by the Principle District Judge dismissing the appeal filed by the appellants.

2. The respondent (original plaintiff) had filed a suit for order and decree against the appellant for perpetual, mandatory injunction and possession in respect of the suit property. Before the trial court, it was the case of the appellant that the grand-father of the appellant had purchased the suit property from one Mr. Martand Karkhandis and the appellant had constructed the gobar gas plant in the suit property.

3. On 5th July, 2000, the original plaintiff had issued a notice to the appellant claiming that they were the owners of the suit property and called upon the appellant to remove the gobar gas plant from the suit property. The original plaintiff thereafter filed a suit for perpetual injunction not to disturb their possession and for injunction from removing the gobar gas plant from the suit property.

4. Before the trial court both the parties examined the witnesses. It was the case of the defendants that the defendants were the owners of the suit property. It was the case of the original plaintiff that the suit property was ancestral property of the plaintiff.

5. The learned trial judge has passed a detailed order and judgment and has rendered a finding of fact that the original plaintiff had failed to prove by leading evidence that the plaintiff was the owner of the suit property or that the said property was the ancestral property of the plaintiff. The learned trial judge however has adverted to the oral evidence led by the appellant (original defendant) and more particularly the cross examination of the witnesses examined by the appellant before the trial court. The learned trial judge has rendered a finding of fact that though the original plaintiff had not able to prove the case that the suit property was ancestral property of the plaintiff, since the appellant (original defendant) had admitted in the cross examination that the suit properties were the ancestral properties of the plaintiffs, the learned trial judge decreed the suit in favour of the plaintiff and granted mandatory injunction directing the respondent to remove suit structure constructed by the respondent on the suit property.

6. In the appeal filed by the appellant herein, the learned District judge after formulating the points for determination has once again adverted to the oral evidence as well as the documentary evidence led by both the parties and has confirmed the findings rendered by learned trial judge.

7. Learned counsel appearing for the appellant submits that the title in respect of the property was required to be independently proved by the plaintiff which the plaintiff had failed to prove. He submits that merely because in the cross

examination of the witness examined by the appellant, the witness had admitted that the suit property was ancestral property of the plaintiff, that was not sufficient for rendering a finding on title of the suit property by the learned trial judge. In support of this submission, learned counsel placed reliance on section 58 of the Indian Evidence Act, 1872 and would submit that the facts which were not admitted by the defendants were required to be proved. He also placed reliance on order 8 rule 5 and would submit that since the defendant had denied the ownership of the plaintiff in the suit property, the same was specifically required to be proved by the plaintiffs. The learned trial judge as well as the learned district judge could not have rendered a finding of title in respect of the suit property merely on the basis of the cross examination of the witness of the defendant.

8. Learned counsel also placed reliance on the judgment of Madras High Court in case of ***S.Madasamy Thevar vs.A.M.Arjuna Raja, AIR 2000 Madras 465*** and in particular paragraph 45. He submits that since the plaintiff had failed to prove his case independently in respect of the title, he could not rely upon the inconsistency in the cross examination of the witness examined by the defendant.

9. A perusal of the record clearly indicates that the learned trial judge has rendered a finding of fact that the appellants (original defendants) had failed to prove clear title in respect of the suit property though its was specifically pleaded before the trial judge. The findings of title against the appellants has been

confirmed by the learned district judge. Learned counsel appearing for the appellant fairly states that the finding of fact insofar as title of the defendant in the suit property which is concurrent finding of fact cannot be interfered by this court under section 100 of the Code of Civil Procedure. He however laid emphasis on the issue that both the courts below could not have rendered a finding in favour of the plaintiff on title since the same was not independently proved by the plaintiff.

10. A perusal of the section 58 of the Indian Evidence Act, 1872 and more particularly proviso thereto makes it clear that the court may in its discretion require the facts admitted to be proved otherwise such admission. In this case the learned trial judge has though held that the plaintiff was not able to independently prove that the suit property was ancestral property of the plaintiff, since the defendant had admitted in the cross examination that the suit property was ancestral property, he rendered a finding on title in favour of the plaintiff. In my view the the learned trial judge was entitled to consider the overall evidence led by both the parties to render a finding of fact that the suit property was an ancestral property of the plaintiff. Be that as it may, it was at the discretion of the trial court to require the plaintiff to prove title otherwise than admission. This court cannot interfere with the discretion not having been exercised by the trial court. In my view section 58 of the Indian Evidence Act, 1872 thus would not assist the case of the appellant.

11. Similarly Order 8 Rule 5 of the Code of Civil Procedure which also gives discretion to the trial court to require any fact so admitted to be proved otherwise such admission. In my view even if the learned trial judge has not exercised such discretion, in my view since the learned trial court has considered the overall evidence led by both the parties, no infirmity with such finding of fact can be found. Insofar as judgment of Madras High Court in case of ***S.Madasamy Thevar (supra)*** relied upon by the learned counsel for the appellant is concerned, it is held by Madras High Court that the plaintiff cannot rely upon the inconsistency or loopholes or efficiency of the material in case of the defendant. In my view the facts before the Madras High Court are totally different. In this case not only the appellant (original defendant) admitted repeatedly in the cross examination that the suit property was an ancestral property of the plaintiff but also the witnesses examined by the defendant also admitted this position.

12. In view of the fact that the defendant also could not prove title in respect of the suit property and the said finding of fact had attained finality. The learned trial judge in my view has rightly directed the appellant to remove the suit structure from the suit property. The findings recorded by both the courts in favour of the plaintiff that the suit property was an ancestral property of the plaintiff are concurrent findings. In my view there is no perversity in the concurrent findings rendered by the two court below and thus cannot be interfered with under section

100 of the Code of Civil Procedure, 1908.

13. In my view no substantial question of law arises in this second appeal. Second appeal is devoid of merits and is accordingly dismissed. In view of the dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]