

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.560 OF 2014
WITH
CIVIL APPLICATION NO.1377 OF 2014

Nitin Prabhakar Shelar and another ... Appellants
Vs.
Pradeep Prabhakar Gurav ... Respondent

Mr. Madhav J. Jamdar for Appellants.
Mr. Arshad Nehal for Respondent.

CORAM : R. G. KETKAR, J.
DATE : MAY 07, 2015

P.C. :

Heard Mr. Jamdar, learned Counsel for appellants and Mr. Nehal, learned Counsel for respondent at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908, the original defendants have challenged the judgment and decree dated 03.05.2013 passed by the learned 4th Additional Judge, Small Causes Court and Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.2219 of 2009 as also the judgment and decree dated 24.03.2014 passed by the learned District Judge-11, Pune in Civil Appeal No.444 of 2013. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter be referred to as the plaintiff and declared that the property described in paragraph 1 of the plaint is of plaintiff's ownership. The Courts below also directed appellants, hereinafter be referred to as defendants, to handover the vacant and peaceful possession of the suit premises to the plaintiff within 2 months from the date of the order.

3. In support of this Appeal, Mr. Jamdar submitted that in the year 1988, Sadhana Co-operative Housing Society (for short 'Society') had allotted plot No.31 to Ratnaprabha Prabhakar Gurav, mother of plaintiff and defendant No.1. Prabhakar Gurav - father of the plaintiff and defendant No.1 was working in Police department. In the year 1986, construction of the ground floor was completed. In the year 1994-1995, first floor was constructed. In the year 1995, family shifted to the suit property. On 23.09.2008, parents of plaintiff and defendant No.1 executed a gift deed in favour of the plaintiff. Plaintiff claims ownership of the suit property on the basis of the said gift deed. He submitted that defendant No.1 is born on 02.02.1970. From 1982-1983 onwards, he was working as a salesman. He was also plying auto-rickshaw and was in the employment of Chordiya Food Products Limited. He submitted that the construction of the first floor was made by defendant No.1. Neither the mother nor the father of the plaintiff had carried out construction. Defendant No.1 carried out construction of the first floor. Plot was not exclusively allotted to mother. It was allotted for the benefit of the entire family and as such, mother is a trustee.

4. Mr. Jamdar further submitted that in the plaint, and in particular paragraph 5, plaintiff asserted that first floor is occupied by defendants. It was given to them for temporary occupation and residential purpose. They had no place to stay. Defendants are enjoying this place without paying any charges to the plaintiff. Mr. Jamdar submitted that plaintiff came with the case that defendants are gratuitous licensees. In view thereof, Civil Court will have no jurisdiction to entertain and try the Suit. He submitted that specific preliminary issue as regards jurisdiction was raised before the trial Court. Defendants relied upon the decision of the Full Bench of this Court in the case of *Prabhudas Damodar Kotecha and another Vs. Manharbala Jeram Damodar*, 2007 (5) Bom.C.R.1 to

contend the suit between the licensor and licensee can be tried only by the Small Causes Court and not by any other Court. By order dated 09.11.2012, the learned trial Judge overruled the preliminary objection by holding that the Civil Court has requisite jurisdiction to entertain and try the Suit. He submitted that eventually, the learned trial Judge decreed the Suit. Though specific ground was not raised in the Appeal memo filed by defendants against the trial Court's decision, the said point was urged before the District Court. However, the learned District Judge did not record any finding in that regard. It is, therefore, open to the defendants to raise this contention in the Second Appeal as this question goes to the root of the matter. For all these reasons, he submitted that the Appeal requires consideration.

5. On the other hand, Mr. Nehal supported the impugned order. He submitted that plaintiff has examined himself, his father and mother in support of his case. In paragraph 2 of the examination in chief of plaintiff's father, he deposed that plot No.31 is his and his wife's self-acquired property. The construction made over plot No.31 is from his income and is therefore, their self-acquired property. The said statement remained unchallenged. In the cross-examination, suggestions were given to the plaintiff's father that construction of the first floor was made by the defendant No.1. The suggestion was denied by the witness. Further suggestion was given to the effect that defendant No.1 is the owner of the first floor. That was also denied by the witness. He also invited my attention to paragraph 4 of the cross-examination of defendant No.1 wherein he admitted that construction of the first floor was initially unauthorized. The construction of the first floor was regularized. He did not give anything in writing to the Planning Authority that defendant No.1 was the owner of the structure or that it was carried out by him or that he was given the permission to construct.

The construction of the first floor was regularized in the year 1996. The tax receipt of the first floor was also issued in the name of his mother. He also invited my attention to paragraph 6 of the cross-examination where defendant No.1 admitted that he did not maintain any account in respect of his income. He does not have any document to show that he was working. Mr. Nehal submitted that after considering the evidence on record, the Courts below found that defendant No.1 did not establish ownership over the first floor, which is the property in dispute and that on the basis of the gift deed dated 23.09.2008, plaintiff has become the owner of the suit property. He, therefore, submitted that no case is made out for invoking the powers under Section 100 C.P.C.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, first floor admeasuring 880 sq.ft. is the property in dispute. It has come on record that Prabhakar Gurav, father of the plaintiff and defendant No.1 was working in the Police Department since 1959. In paragraph 2 of the examination-in-chief, Prabhakar Gurav deposed that plot No.31 is his and his wife's self-acquired property. The construction made over that plot is also their self-acquired property. Perusal of the cross-examination of this witness does not indicate that the said statement was challenged. On the other hand, suggestions were given to the witness that defendant No.1 had made construction of the first floor. The said suggestion was denied. Further suggestion was given that defendant No.1 is the owner of the first floor. That was also denied by the witness. Apart from that, perusal of the cross-examination of defendant No.1 and in particular, paragraphs 4 and 6 shows that defendant No.1 admitted that construction of the first floor was regularized in the name of his mother. The tax receipt of the first floor was also standing in the name of his mother. The Courts

below, after appreciating the evidence on record, have held that defendant No.1 was not having any income so as to contribute for construction of the first floor. The Courts below also held that defendant No.1 failed to establish that from his income, he had made construction of the first floor. In particular, the learned District Judge, in paragraphs 23 to 26, has observed that considering the admissions given by the defendant No.1 during his cross-examination, it can be mentioned that there was no source of sufficient income to defendant No.1 to construct the first floor.

7. Mr. Jamdar submitted that the Civil Court has no jurisdiction to entertain and try the Suit as the Suit is between the licensor and licensee. Perusal of the order dated 09.11.2010 shows that the learned trial Judge has considered Full Bench decision of this Court in the case of **Prabhudas Damodar Kotecha** (*supra*). In paragraphs 7 to 9, the learned trial Judge, after considering the submissions, held that the Civil Court has requisite jurisdiction to entertain and try the Suit. Under Section 105 C.P.C., defendants could have challenged that order in the Appeal filed before the District Court. Perusal of the grounds of appeal memo does not indicate that any such ground was raised. That apart, defendants could have separately challenged the order passed on this preliminary issue. However, no material is brought to the notice of this Court pointing out that any challenge was raised before the appellate Court. It is, therefore, not open to the defendants to agitate this point in the Second Appeal for the first time.

8. The findings recorded by the Courts below are based upon the appreciation of evidence on record. Defendants were not in a position to demonstrate that the findings were perverse being contrary to evidence on record or that there is no evidence to support the findings. Merely

because on the basis of the available evidence on record, another view is possible, that itself, is no ground for invoking powers under Section 100 C.P.C.

9. Defendant No.1 is real brother of plaintiff. Defendant No.2 is his wife. Father and mother of plaintiff and defendant No.1 executed registered gift deed on 23.09.2008 in favour of the plaintiff. Defendant No.1 is ungrateful son and brother. Before parting, it is necessary to consider the decision of the Apex Court in the case of *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria (Dead) through L.Rs*, **AIR 2012 Supreme Court 1727**. The Apex Court observed in paragraphs 84 and 85 as under:-

“False claims and false defences

84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in *Ramrameshwari Devi and Ors.* (**AIR 2011 SC (Civ) 1776:2011 AIR SCW 4000**) (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

Grant or refusal of an injunction.”

10. In paragraph 85, the Apex Court has considered its earlier decision in Ramrameshwari Devi and observed that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants.

11. After considering the entire material on record as also considering the submissions, I do not find that the Courts below committed any error. Defendants have raised false plea with a view to delaying handing over possession. It is, therefore, necessary to impose exemplary costs before dismissing the Appeal.

12. In the light of the aforesaid discussion, Appeal does not raise any question of law much less any substantial question of law. Hence, Second Appeal fails and the same is dismissed. Costs is quantified at Rs.25,000/- to be paid to the plaintiff within a period of 12 weeks. If the costs is not paid within the stipulated period, Collector, Pune shall recover the costs from defendants as a land revenue. Order accordingly.

13. In view of the dismissal of the Appeal, nothing survives in Civil Application No.1377 of 2014 and the same is disposed of.

14. At this stage, Mr. Jamdar orally applies for continuation of the ad-interim order dated 08.12.2014 for a period of 12 weeks from today as they intend to challenge this order before the higher Court. He states that within 2 weeks, defendants and all the adult family members residing with them will file usual undertaking in this Court incorporating therein that,

- a. they are in possession and nobody else is in possession of the suit property;

- b. they have neither created third party interest nor parted with possession of the suit property;
- c. they will hereafter neither create third party interest nor part with possession of the suit property;

15. Before filing undertaking, defendants will give advance copy to the other side. If the undertaking in the aforesaid terms is filed within the stipulated time, the same shall stand accepted.

16. In view thereof, notwithstanding the dismissal of the Second Appeal, ad-interim order dated 08.12.2014 shall remain in force for a period of 12 weeks from today. It is expressly made clear that in case the defendants do not file undertaking in the aforesaid terms within 2 weeks from today, ad-interim order shall stand vacated without further reference to the Court. It is further made clear that in case, defendants do not obtain suitable orders from the higher Court within 12 weeks from today, plaintiff will be at liberty to proceed in the matter in accordance with law. In case defendants obtain suitable interim relief, they will forthwith send copy of that order to the Collector, Pune. Let the authenticated copy of this order be sent to the Collector, Pune for doing the needful. Order accordingly.

(R. G. KETKAR, J.)

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