

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

***SECOND APPEAL NO. 230 OF 2015
Along with
CIVIL APPLICATION NO. 481 OF 2015***

Mr.Lalsaheb s/o Manikso Shaikh ... Appellant.
V/s.
Mr. Badesaheb Manikso Shaikh and Ors. ... Respondents.

Mr.S.S.Kanetkar a/w Mr.V.H.Narvekar, for the Appellant /
Applicant.
Mr.A.V.Anturkar -Senior Advocate i/b Mr.Samir Kumbhakoni, for
Respondent No.2.

***CORAM : N.M.Jamdar, J.
Monday, 1 August 2016.***

Oral Order :

The Appellant challenges the concurrent Judgment and Orders passed by the Civil Judge, Senior division Solapur and District Judge, Solapur wherein the Suit filed by Respondents / Plaintiffs was decreed and the Appeal filed by the Appellant was dismissed.

2. The parties are related. The Appellant, who is the original Defendant No.1 is the brother of Respondent No.1- the Plaintiff. The dispute between the parties was referred to an arbitrator who declared his award. Regular Civil Suit No.91 of 1976 was filed for

the execution of the award. In these proceedings Application No.4 of 1981 was filed for purpose of adjusting the decree and a decree was thereafter passed after adjustment. Record was thereafter reconstructed. The Respondents-Plaintiffs filed a suit bearing No.193 of 2000 which was withdrawn with liberty to file a fresh suit. Thereafter the present Suit bearing Special Civil Suit No.66 of 2004 was filed by the Respondents-Plaintiffs. It was contended by Respondents-Plaintiffs that the property which has come to the Respondents-Plaintiffs by way of Adjustment deed was encroached by the Appellants and the encroachment needed to be removed and the possession handed over to the Respondents-Plaintiffs. The learned Civil Judge, decreed the suit by judgment and decree dated 6 March 2009. Appeal filed by the Appellants was dismissed by the learned District Judge, by order dated 14 November 2014.

3. Mr.Kanetkar, the learned counsel for the Appellants firstly, submitted that once the Appellants had denied the title of the Respondents-Plaintiffs, a suit for simplicitor encroachment was not maintainable and the declaration of title ought to have been sought. The submission cannot be accepted. In the facts of present case, it was not necessary for the Respondents-Plaintiffs to seek declaration again. In the earlier round of litigation between the very same parties, decree was passed in favour of Respondents-Plaintiffs in which the property Gat No.1257 has come to the share of

Respondents-Plaintiffs. This decree was never challenged by the Appellants and therefore, again declaration of title need not have been sought. The submission advanced by Mr.Kanetkar therefore cannot be accepted.

4. Mr.Kanetkar, then submitted that the Suit was beyond limitation and the stand was taken in the Written statement to that effect. He submitted that earlier Suit was withdrawn with liberty to file fresh Suit, keeping the point of limitation open. I have considered the submission. In the plaint, the Appellant has given the starting point for the purpose of limitation. Though Respondents-Plaintiffs has stated that the encroachment took place on 14 September 2000, the further cause of action is stated to be on 23 January 2004. When inspite of request, encroachment was not removed and there was a Sale deed which was executed on 31 October 2002, by bare reading of the plaint the Suit which is filed on 19 March 2004 was within the limitation. It was then for the Appellants to take up this contention regarding the Suit beyond limitation and urge the same. It appears that this issue was not urged in the trial Court as well as in the appellate Court as there is no issue framed. Once in the plaint, cause of action was pleaded and it was demonstrated that Suit is within limitation, except for controverting the position in the Written statement, the objection does not seem to have been pursued any further. Even assuming that the issue is to be

taken up now for consideration, no factual foundation is laid why the statement made in the plaint be not accepted. In the circumstances, this submission also cannot be accepted.

5. Mr.Kanetkar then submitted that, in the alternative even assuming the Adjustment deed is to be accepted, the flour mill and house property bearing No.1739 which is situated on Gat No.1257, has come to the share of the Appellants. This submission also cannot be accepted. Whether the house No.1739 and the flour mill are situated in Gat No.1257 is purely a question of fact. The entire line of argument of the Appellants before the Courts was that the adjustment deed is not correct and so also the Appellants did not acknowledge the decree passed in the earlier suit. The argument which was sought to be advanced now was never argued in the Courts below. There is no issue framed by both the Courts. Except that one line in the appeal memo before District Court, this alternate argument was not advanced.

6. The Appellant has gone to the extent of disputing the court record and having failed in that endeavour, he is arguing a factual aspect for the first time in Second Appeal. During the trial, the parties must be candid in their stand. It is the contention of Mr.Kanetkar, that there is a clear admission of the Respondents-Plaintiffs in the evidence and therefore, the location of the house and flour mill is not a disputed position. I have gone through the

evidence of the Respondents-Plaintiffs. The Respondents-Plaintiffs in fact have denied the suggestion as regards the flour mill. The Appellant has in fact suppressed that the flour mill is not in operation since 1981. Therefore there is no clear unequivocal admission as contended by Mr.Kanetkar.

7. Any further exercise would be exercise in appreciation of evidence. Both the Courts have concurrently found that Appellant has no title to the property and must hand over the possession of the property to the Respondents-Plaintiffs. There is no error or perversity in this conclusion. It is not possible to re-appreciate the evidence. No question of law arises. Second Appeal is accordingly dismissed. Civil Application stands disposed of.

8. At this stage, Mr.Kanetkar seeks continuation of the ad-interim relief. Mr.Anturkar, opposes. Considering the facts and circumstances, the ad-interim granted by this Court will continue for a period of eight weeks subject to filing an undertaking by the Appellant and adult family members occupying the suit premises with him that, they will not create third party rights or part with possession during this period.

(N.M.Jamdar, J.)