

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 16 OF 2007

Shri Gopal Madhav Gokhale & Anr.	...Appellants
<i>Versus</i>	
Shri Narayan Sadashi Gokhale	...Respondent

Mr. A.A. Garge, for the Appellants.

Mr. R.M. Momin, for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 24th November 2016

ORDER :

1. By this Appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the Judgment and Decree dated 19th August 2006 passed by the Learned District Judge, Sangli, dismissing the Regular Civil Appeal No. 96 of 2000 filed by the appellants by which the appellants had impugned the Judgment and Decree

dated 18th April 2000 passed by the learned Civil Judge, Senior Division, Sangli, dismissing the Special Civil Suit No. 168 of 1997 *inter alia* praying for declaration and injunction in respect of the suit property i.e. the suit land bearing City Survey No. 6335.

2. For the sake of convenience, the status of the parties described in this Judgment is as per the status before the Trial Court. The appellants herein were the original plaintiffs, whereas the respondent herein was the original defendant before the Trial Court.

3. Janardan had two sons namely Ganesh and Sadashiv. The Defendant was son of Sadashiv. Ganesh have two sons by name Dattatraya and Madhav. The Plaintiffs' father name Madhav. Dattatray had two sons namely Moreshwar and Shrikrishna. Madhav had two sons namely Bhaskar and Gopal.

4. Moreshwar and Shrikrishna who were sons of Dattatray filed the Suit *inter alia* praying for partition of the suit property. In the said Suit, a decree was passed. Under the said

decree, Moreshwar and Shrikrishna received 1/4th share whereas the Plaintiffs and their father namely Madhav Ganesh jointly received 1/4th share and 1/2 share was received to the Defendant. It is disputed that though the said Suit was decreed, the present Plaintiffs abandoned the execution proceedings.

5. It was the case of the Plaintiffs that father of the Defendant executed an agreement in favour of the Plaintiffs on 13th March 1965 and agreed to distribute 1/2 of the suit house situated in property bearing CTS No. 6335. It is not in dispute that the decree passed by the Trial Court in the said Suit filed by Moreshwar and Shrikrishna, the shares of the parties were determined. Moreshwar and Shrikrishna received 1/2 share in CTS No 6335. Deceased Madhav to whom urgent reliefs claimed has given 1/4th share in the suit property. The Defendant was given 1/2 share in the said property CTS No. 6335. As against 1/4th share of Moreshwar and Shrikrishna, they were allotted plot in CTS No. 6335. The Commissioner was appointed in the execution proceedings who suggested partition.

6. The Plaintiffs filed a Suit (Special Civil Suit No. 168

of 1997) initially for injunction and thereafter applied for declaration in respect of 1/2 share in CTS No. 6335. The Suit was resisted by the Defendant on various grounds. The Defendant denied the alleged agreement between the father of the Plaintiffs and the Defendant dated 18th March 1965. On the basis of the said alleged agreement, the Defendant had alleged to have given 1/2 portion in the suit property to the daughter of the Plaintiffs. The Defendant also denied that the suit property was given in possession of the father of the Plaintiffs i.e. southern portion and northern portion remained in possession of the Defendant. It was contended by the Defendant that since date of passing of the decree, the Defendant was in possession of 445.9 sq.meter. The Defendant denied that the Plaintiffs were in enjoyment of the possession of th 1/2 portion of the suit property.

7. The learned Trial Judge framed ten issues for determination. The Plaintiffs as well as the Defendant led oral as well as documentary evidence. The learned Trial Judge passed a judgment and decree dated 18th April 2000 after considering

the oral and documentary evidence and dismissed the said Suit filed by the Plaintiffs *inter alia* praying for declaration and alleged ownership in the 1/2 share of this suit land bearing CTS No. 6335 and praying for injunction.

8. Being aggrieved by the said judgment and decree dated 18th April 2000 passed by the learned Trial Judge, the Plaintiffs preferred an appeal (Regular Civil Appeal No. 96 of 2000) in the Court of the learned District Judge, Sangli. The learned District Judge, Sangli formulated three points for determination and after considering the oral and documentary evidence rendered a finding that the Plaintiffs were not the owners of the suit house to the extent of 1/2 share. This judgment and decree dated 19th August 2006 passed by the learned District Judge-1, Sangli is impugned by the Plaintiffs in this Second Appeal under Section 100 of the Code of Civil Procedure, 1908.

9. This Court while admitting this Second Appeal on 24th July 2007 formulated the following substantial question of law:-

Whether the agreement dated 13-03-1965 has been rightly treated as inadmissible in evidence in view of the provisions of Section 19 of the Indian Evidence Act, 1872?

10. Mr. Garge, the learned Counsel appearing for the Plaintiffs invited my attention to findings recorded in the impugned order and the ground of Appeal in Regular Civil Appeal No. 96 of 2000 and would submit that none of the grounds raised by the Plaintiffs in the said Appeal have been dealt with by the learned District Judge. He submits that the Plaintiffs were in possession of the 1/2 portion of the Suit bearing CTS No. 6335 since the date of execution of the agreement dated 13th March 1965. He submits that since the Defendant started demolition of the portion of the suit property, the Plaintiffs were required to file a Suit for injunction against the Defendant. He submits that since the Defendant started claiming the right, title and interest in the suit property, the Plaintiffs thereafter, also claimed declaration in respect of their ownership in respect of 1/2 portion of the suit property bearing

CTS No. 6335.

11. It is submitted by the learned Counsel that though the Court Commissioner was appointed and had submitted Report before the learned Trial Judge, showing the possession of the Plaintiffs in respect of 1/2 portion of the suit land, the learned Trial Judge did not consider the Commissioner's Report at all in the impugned judgment and decree. He submits that various findings of facts rendered by the two Courts below being perverse are required to be interfered with by this Court.

12. The Learned Counsel for the Plaintiffs submits that though the agreement dated 13th March 1965 relied upon by the Plaintiffs was 30 years old, the Trial Court as well as Appellate Court totally ignored the said documents and erroneously held that the said documents were inadmissible in law.

13. The learned Counsel for the Defendant on the other hand, invited my attention to various findings of facts

rendered by the two Courts below and submits that findings of facts being concurrent and not being perverse cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

14. It is submitted that though the Plaintiffs had admittedly filed the execution application for executing the decree passed by the Trial Court in the Suit for partition filed by the Moreshwar and Shrikrishna declaring the share of parties in respect of the suit land bearing CTS No. 6335 and 6336, the Plaintiffs abandoned the said execution proceedings for the reasons best known to the Plaintiffs. He submits that during the pendency of the execution proceedings filed by the Plaintiffs, the Plaintiffs never relied upon alleged agreement dated 13th March 1965.

15. Insofar as the Commissioner's Report relied upon by the learned Counsel for the Plaintiffs is concerned, it is submitted that the said Commissioner had visited the site without giving notice to the Defendant. He submits that the said Court Commissioner was not examined by the Plaintiffs as a

witness and thus, said Commissioner's Report was rightly disbelieved by the learned Trial Judge as well as first Appellate Court.

16. It is submitted by the learned Counsel that since on the basis of the said alleged agreement dated 13th March 1965, the Plaintiffs have claimed share in respect of the 1/2 share in CTS No. 6335 and the said document admittedly being not registered document, the learned Trial Judge rightly considered the said document as inadmissible in law. The learned Trial Judge rightly disbelieved the document. The Defendant had disputed the existence and contents of such alleged document.

17. It is not in dispute that the Trial Court had passed a decree in the Suit filed by the Moreshwar and Shrikrishna adjudicating upon the share of all the parties to the said Suit including the Plaintiff herein and the Defendant. It is not in dispute that in the said decree, Moreshwar and Shrikrishna were given 1/4th share in the suit land bearing CTS No. 6335. Madhav through whom the Plaintiffs are claiming

share was given 1/4th share. The Defendant Narayan was given 1/2 share. It is also not in dispute that as against 1/4th share of Moreshwar and Shrikrishna in CTS No. 6335, they are allotted share in CTS No. 6336. It is thus, clear that under the said decree, the Defendant was given 3/4th share in CTS No. 6335.

18. It is not in dispute that the said decree passed by the Trial Court in the said Suit filed by Moreshwar and Shrikrishna, the Plaintiffs did not impugn the said decree.

19. The Plaintiffs however, sought ownership in respect of 1/2 share in the land CTS No. 6335 on the basis of the said alleged agreement dated 13th March 1965. The Defendant had disputed the existence of the said agreement. It is not in dispute that the execution proceedings filed by the Plaintiffs in respect of the said decree passed in the said Suit in the year 1960, the Plaintiffs never relied upon the alleged agreement for several years.

20. It is not in dispute that the said alleged agreement was relied upon by the Plaintiffs is not registered

document by which the Plaintiffs had claimed ownership right to the extent of 1/2 share in respect of 1/4th share in the said decree was not registered.

21. A perusal of the judgment and decree dated 18th April 2000 passed by the learned Trial Judge indicates that the learned Trial Judge has rightly rendered findings that the Plaintiffs had failed to prove the alleged right in the suit property. The Plaintiffs also failed to prove their ownership and possession over the suit property. The Defendant had proved that the CTS No. 6335-A was in his exclusive possession and was entitled to develop the said property. The learned Trial Judge, in my opinion, has considered all the documents including oral evidence led by both the parties and have rightly disbelieved the exparte Report submitted by the learned Court Commissioner and has rightly dismissed the Suit for declaration and possession.

22. Insofar as the submission of the learned Counsel for the Plaintiffs that the two Courts below have failed to appreciate the Court Commissioner's Report relied upon by

the Plaintiffs is concerned, it is not in dispute that the Commissioner had visited the suit site without issuing notice of the Defendant. The Report of the Commissioner was disputed by the Defendant. It is not in dispute that the Plaintiffs did not examine the Court Commissioner before the learned Trial Judge to prove the existence and contents of the said Report submitted by him. A perusal of the judgment and decree passed by the two Courts below clearly indicates that both the Courts have disbelieved the said Report and rightly held that it was not proved by the Plaintiffs. In my view, there is thus no substance in the submission of the learned Counsel for the Plaintiffs.

23. Insofar as submission of the learned Counsel for the Plaintiffs that the first Appellate Court has not dealt with the grounds raised in the Appeal filed by the Plaintiffs is concerned, I have perused the ground raised by the Plaintiffs in the Memorandum of Appeal and also judgment and decree passed by the first Appellate Court. A Perusal of the judgment and decree passed by the first Appellate Court indicates that in the said judgment and decree the first Appellate Court has

rendered detail reasons and has dealt with the grounds raised by the Plaintiffs in the Memorandum of Appeal. The first Appellate Court has independently considered the documentary and oral evidence in the judgment and decree which, in my opinion, being not perverse, cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

24. Insofar as the substantial question of law formulated by this Court while admitting the Second Appeal on 24th July 2007 is concerned, for the reasons recorded aforesaid, the said question is answered in the affirmative.

25. In my view, the Second Appeal is totally devoid of merits and is accordingly, dismissed.

26. No order as to costs.

[R.D. DHANUKA, J.]

27. At this stage, Mr. Garge, the learned Counsel for the Plaintiffs states that the Defendant shall not carry out

construction in the suit property for a period of two months. The learned Counsel for the Defendant on instructions states that his client will not carry out any construction in the suit property for two months. The statement is accepted.

28. If any special leave petition is filed by the Plaintiffs, a copy of the papers and proceedings and the notice shall be served upon the Defendant in advance.

[R.D. DHANUKA, J.]