

Sequeira

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

***SECOND APPEAL (Stamp) NO. 6246 OF 2017
Along with
CIVIL APPLICATION NO. 589 OF 2017***

Ramu Krushna Lokhande

(Deceased through L.R.s)

1-a. Smt.Sakhubai Ramu Lokhande

and others

.. Appellants

Vs

Bapu Krushna Lokhande

(Deceased through heirs & L.R.s)

1a. Smt.Muktabai Bapu Lokhande & ors.

.. Respondents

Mr.Chetan Patil, for Appellants / Applicants.

Mr.Abhijit Adagule, for Respondents.

Coram : N.M.Jamdar, J.

Date : 18 April 2017.

Oral Order :

The Appellants have challenged the orders passed by the learned Civil Judge, Junior Division, Kolhapur dated 4 February 2012 in Regular Civil Suit No.980 of 2002 and the counter claim therein and the judgment and order passed by the learned District Judge, Kolhapur, dated 11 November 2016, dismissing the Appeal of the Appellants.

2. The parties are related. The original Plaintiff and the Defendant No.1 are brothers. The dispute pertains to a house property situated in Kolhapur. The Suit was filed by the Respondent-Plaintiff on the basis of title for possession of the suit property. The Appellants filed Written statement and also a counter claim. According to them though the name of the Respondent-Plaintiff appeared in the record and that the property was allotted by the Government in the name of Respondent-Plaintiff in lieu of surrendering an encroached portion, it was essentially a property which was held jointly by the Defendant No.1 and the Plaintiff i.e. the brothers. The learned Civil Judge negated the case of the Appellants and by judgment and order dated 4 February 2012 decreed the Suit and dismissed the counter claim. The learned Civil Judge held that the Respondent-Plaintiff was the only owner of the suit property and had constructed thereupon and it is only out of the relationship that the Defendant No.1 was permitted to stay. The learned Judge held that Defendant No.1 failed to prove that he had one half share in the suit property or that he had jointly constructed the suit property. The Regular Civil Appeal No.129 of 2012 was filed by the Appellants in the District Court, Kolhapur, which was dismissed by the learned District Judge, by judgment and order dated 11 November 2016.

3. Heard learned counsel for the parties.

4. The learned counsel for the Appellants submitted that the

decision of the appellate Court is not as per the provisions of Order 41 Rule 31 of the Code of Civil Procedure, in as much as there is no independent reasoning given by the appellate Court. The learned counsel submitted that though the property may have been allotted by the Government in favour of the Respondent-Plaintiff it was in fact allotted jointly to the family i.e. to the Plaintiff and Defendant No.1. It was submitted that the Defendant No.1 was residing in the suit property from 1962 and was residing in the same and even the earlier encroached portion and the theory of the Respondent-Plaintiff that the Appellant subsequently, came to the city, is bogus. The learned counsel submitted that all throughout in the assessment record the name of the Appellant appears as an owner, also the tax receipts are issued in his name. It is also contended that the partition wall has been put up, so also separate bathroom has been created. It was submitted that separate electricity bills and water bills are issued in the name of the Appellant and the Defendant No.1 contributed to the construction of the building. It was submitted that the application for secondary evidence, though was granted, the documents were not considered and the First Appellate Court committed the same error in not examining the documentary evidence and not disposing of the applications filed. It was contended that since the Appellants also had right in the property, the judgment and decree could not have been passed.

5. The learned counsel for Respondent-Plaintiff on the other hand

relied upon the documents which are part of the proceedings, such as the award, the notice of the award, application for loan for construction, mortgage of the property, the tax receipts, etc.

6. The moot question that arises, since it is a suit based on the title, as to what is the legal right of the Appellants to occupy the suit property. It appears from record that in the suit property two rooms are in possession of the Appellants. One room is in possession of a tenant and rest of the portion is in possession of the Respondent-Plaintiff. It also appears from the various documents which have been produced by the Appellants that the Appellants are in possession of the suit property for a long time. Assuming this position as accepted, all that would establish is long standing possession of the Appellants, but it still beeps the question as to what is the legal right of the Appellants to occupy the premises. It is not the case put up by the Appellants that the property is a joint family ancestral property and that the Respondent-Plaintiff is a *karta* of the joint property, or that allotment by the Government was in the name of Respondent-Plaintiff as a *karta*.

7. The encroached portion, as the award dated 28 January 1957 would show, also stood in the name of the Respondent-Plaintiff. Thereafter an award was passed by the Arbitrator under town planning scheme in the name of the Respondent-Plaintiff. The notice is issued alone to the Respondent-Plaintiff. The possession

receipt executed on 8 May 1962 shows that the possession was taken from Respondent-Plaintiff. After this possession has been taken admittedly, the property is thereafter allotted to Respondent-Plaintiff. Merely because the Defendant No.1 is his brother cannot straightaway lead to a conclusion that the property is jointly owned because there is no theory of joint family property, as envisaged under Hindu law, is claimed. Unless a rival title is set up and proved, a suit based on title cannot be defeated.

8. Not only the property initially stood in the name of the Respondent-Plaintiff and allotted, it appears that thereafter Respondent-Plaintiff mortgaged the same for construction. The loan was taken for construction and repaid. Tax receipts produced on record show the name of Respondent-Plaintiff. It may be that Appellants have paid tax for some time. The tax receipt shows that they have been paid by the Appellant, but not as an owner of the suit property.

9. As far as documentary evidence produced by way of secondary evidence or sought to be produced in the First Appellate Court is concerned, they again relate to possession of the suit property and not to the title. Even assuming the separate water bills and electricity connection have been issued in the name of the Appellants or that they have put up a wall, will not confer any right upon the same, as electricity connection or water bills are not documents of title.

10. There is no suit instituted by the Defendant No.1 challenging the allotment of land in favour of Respondent-Plaintiff alone. It is after the suit filed by the Respondent-Plaintiff that a counter claim has been filed. Therefore, not only the Respondent-Plaintiff has been recognised as an owner but the same position is continued since 1957.

11. As far as the criticism of the decision of the appellate Court based on the ruling of the Apex Court in the case of *H. Siddiqui(dead) by Lrs. Vs. A.Ramalingam – 2011(2) ALL MR 938 (S.C.)* is concerned, perusal of the decision of the appellate Court shows that though there is a brevity in the reasoning, the main point regarding the title of the Appellant has been dealt with. The appellate Court has confirmed the finding that property is owned by the Plaintiff and not owned by the Appellant. It was not necessary to devote large number of pages of discussion on the possession of the Appellant, as the same was not in dispute.

12. Considering this position, I do not find any error committed by both the Courts in recording the finding that the Respondent-Plaintiff proved title over the suit property and not the Appellants.

13. Considering the close relation and that the Appellants are staying in the premises since long, it was put to the party whether the

dispute can be amicably resolved by treating the Appellants as tenants in the suit property. The learned counsel for the Respondent-Plaintiff on instructions submitted that it is not possible to do so as relations are strained and how the only Appellant No.1 and one son stays in the property as against many members in the family of the Respondent-Plaintiff, who require these premises.

14. In the circumstances, no substantial question of law arises. The Second Appeal is accordingly dismissed. Civil Application stands disposed of.

15. The learned counsel for the Appellants seeks postponement of execution proceedings. As the Appellants seek to take the challenge further, it is directed that the possession of the Appellants be protected till 10 July 2017. The Appellants will not create third party rights or part with possession.

(N.M.Jamdar, J.)