

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No.87 of 2013

(Vasant s/o Lalaji Maheshkar and others v. The Nagpur Municipal Corporation, through its Municipal Commissioner, Civil Lines, Nagpur, and another)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's order

Court's or Judge's orders

Shri R.L. Khapre, Advocate for Appellants.

Shri J.B. Kasat, Advocate for Respondent No.1.

Shri R.O. Chhabra, Advocate for Respondent No.2.

Coram : R.K. Deshpande, J.

Date : 5th January, 2017

1. The Trial Court dismissed Regular Civil Suit No.213 of 1998 on 7-8-2003 for grant of declaration that the notices dated 5-9-1986 and 1-11-1997 issued by the defendant No.1- Nagpur Municipal Corporation are null and void, and for grant permanent injunction restraining the defendant Nos.1 and 2 from disturbing or interfering with the possession of the plaintiffs over the suit property. Regular Civil Appeal No.442 of 2003 preferred by the plaintiffs was dismissed on 11-12-2012. Hence, this second appeal by the original plaintiffs.

2. The plaintiff No.1 is reported to have died, and hence the present appeal is being prosecuted by the plaintiff No.2 only, who probably claims to be a partner.

3. The Trial Court holds that the plaintiffs have established that the notices dated 5-9-1986 and 1-11-1997 issued by the defendant No.1 are null and void. It further holds that the suit was barred by the law of limitation and also by the principles of *res judicata*. The plaintiffs are held not entitled to claim any declaration and hence the suit was dismissed. The lower Appellate Court did not consider the findings recorded by the Trial Court on the other aspects of the matter, except to (i) the bar of principles of *res judicata*, and (ii) the bar of limitation. It is held that the suit was not barred by the principles of *res judicata* and sets aside such findings of the Trial Court. While considering the question of bar of limitation, reliance is placed upon the provision of Section 384 of the City of Nagpur Corporation Act and it is held that the cause of action arose on 5-9-1986 and the suit filed on 10-2-1998 was barred by the special law of limitation providing the period of six months. It is in this background, the contentions raised by Shri Khapre, the learned counsel for the appellants, are required to be considered.

4. The following contentions are raised by Shri Khapre :

- (i) None of the Courts below have decided the question of legality of the notices impugned in

the suit and the validity of the Municipal Corporation to issue such notices.

(ii) The finding that the suit was barred by the principles of *res judicata* recorded by the Trial Court has been reversed by the lower Appellate Court, but the lower Appellate Court has committed an error in dismissing the suit as barred by the special law of limitation prescribed under Section 384 of the City of Nagpur Corporation Act.

(iii) The plaintiffs are in settled possession of the suit property since last more than 50 years and, therefore, the Courts below have committed an error in refusing to grant permanent injunction not to disturb the possession of the plaintiffs without having recourse to due provisions of law.

5. There is no dispute that the plaintiffs are the owners of Plot No.237, over which they constructed a cinema theatre. The dispute is in respect of the lane, which is alleged to be existed by the Municipal Corporation in between Plot No.237 and Plot

No.238. The notices were for removal of obstruction created by the plaintiffs over this lane. According to the plaintiffs, the portion covered by this lane was being utilized for the purposes of parking of the vehicles coming to the theatre. The plaintiffs claimed ownership over this lane on the basis of the survey map prepared by the Nazul Department and the entry in the record of rights. In the suit in question, the plaintiffs claimed the reliefs as under :

“(i) declare the impugned notices dated 5/9/1986 and 1/11/1997 as null and void.

(ii) declare that the plaintiffs are entitled to title of ownership over the suit property i.e. alleged encroached land admeasuring 5696 sq.ft. situated on the eastern side of the “Alankar Cinema”, by virtue of the adverse possession thereon.

(iii) permanently restrain the defendants No.1 and 2 from disturbing or interfering with the suit property and the possession thereof.

(iv) grant any other relief as deems fit in the

circumstances.”

6. At subsequent stage, the plaintiffs got deleted the relief claimed in prayer clause (ii) in the plaint as per the order dated 15-7-2003 passed by the Trial Court. In view of this, the relief, which survives for consideration, was two-fold – one was claiming declaration that the notices dated 5-9-1986 and 1-11-1997 as null and void, and another was for permanent injunction restraining the defendants from disturbing the possession of the plaintiffs over the suit property.

7. What was challenged in the suit was the show cause notice dated 5-9-1986 issued by the Municipal Corporation asking the plaintiffs as to why the obstruction created in the lane in question, which vests in the Municipal Corporation, should not be removed. The proceedings of show cause notice culminated into an order dated 1-11-1997 passed by the competent authority for taking possession of the land. A specific question was put to Shri Khapre, the learned counsel for the appellants, to point out the pleadings in respect of continuous possession of the plaintiffs over the land in question, and he invited my attention to paragraph 4 of the plaint, which is reproduced below :

“4. That, the defendant No.1 had not given full particulars, description and the exact location of the alleged encroachment in its impugned notice, nor did it mention the rule or bye-law or any other provisions of law which empowered it to issue it and direct the removal of the alleged encroachment. The notice was therefore, bad in law and illegal. The plaintiff had then clarified to the defendant No.1 that the open land on all sides particularly on the “eastern side” of the theatre building is a part and parcel of the premises of the “Alankar Theatre” and it belongs to them and also that it has been in peaceful use and enjoyment since last more than 50 years through their predecessors in title. It was also further clarified that the alleged encroached land was never used as a passage by other plot holders.”

Shri Khapre has relied upon the decisions of the Apex Court and of this Court in the cases of *Smt. Indumatiben Chimanlal Desai v. Union of India and another*, reported in AIR 1969 Bombay 423; *Municipal Corporation v. Niyamatullah*, reported in AIR 1971 SC 97; *M. Kallappa Setty v. M.V. Lakshminarayana Rao*, reported in AIR 1972 SC 2299; and *Rame Gowda (D) by L.Rs. v.*

M. Varadappa Naidu (D) by L.Rs. and another, reported in *AIR 2004 SC 4609*.

8. Merely because the lower Appellate Court has committed an error in dismissing the appeal by having recourse to the provision of Section 384 of the City of Nagpur Corporation Act without touching the other aspects of the matter, that by itself would not give rise to any substantial question of law unless it is demonstrated before this Court that the legal rights of the plaintiffs are violated. It is not the case of the plaintiffs that they have become owners of the lane in question either on the basis of any order of allotment passed by the competent authority or by way of sale-deed executed by the true owner. It is also not the case of the plaintiffs that the lane in question is the part and parcel of the land owned by them.

9. Whether there existed such a lane or not, may not be a question relevant for the purposes of claiming a simpliciter decree of permanent injunction, unless the plaintiffs have at least semblance of title over the suit property. The relief of perfecting the title over the suit property by way of adverse possession claimed in the suit against the Municipal Corporation was deleted subsequently. In such event, the claim of the plaintiffs for grant of permanent prohibitory injunction by urging that the Municipal Corporation could not be entertained. It was

not a duly constituted suit where the plaintiffs could have called upon the Court to adjudicate upon the authority of the Municipal Corporation to issue such notices. Hence, no substantial question of law arises for consideration.

10. The second appeal is dismissed. No costs.

11. At this stage, Shri Khapre for the appellants seeks continuation of protection for a further period of eight weeks. Since the protection granted continues till this date, it shall stand extended by a further period of eight weeks from today; at the end of which, it shall stand automatically vacated, and the respondents shall be at liberty to proceed to take possession of the property as per the notices impugned in the suit.

Judge.