

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

SECOND APPEAL NO.192 OF 1991

Shivajirao Shankarrao Barge (Decd)

by His Heirs & Ors.

..Appellants

vs.

Sukumaran Narayan Vellivatti & Ors.

...Respondents

Mr.Jayesh M. Joshi for the Appellants.

Mr.Pradeep J. Thorat for the Respondent Nos.1A to 1G.

CORAM : A. M. DHAVAL, J.

DATE : 23rd AUGUST, 2018.

P.C.:

. By order dated 26/3/1991 this appeal was admitted on the following substantial questions of law:

“1. That the finding of the Court that the intention of the Plaintiffs was to sell property C.T.S. No.2058/1A/B to defendant No.1 is not based on any evidence and the said inference drawn by the Court is illegal.

2. That both the Lower Courts have misread and misconstrued the sale deed Ex.71 dated 12/3/1973 and correction deed Ex.69 Consent deed dated 2/4/1973 and Correction Deed Ex.70 dated 4/7/1974.

3. That it ought to have been held that on a proper construction of these documents the suit property as not sold to Defendant No.1 and, therefore, he had no right, title and interest in the property.

4. That the pleadings have not been properly constructed.

5. That the evidence given by the Defendant No.1 and the admissions made by him are not properly considered.

6. That it ought to have been held that the entries made in the Municipal record were made without any notice to the Plaintiffs and, therefore, they were not binding on them.”

2. The Appellants are the original plaintiffs. They had filed Regular Civil Suit No.88/1977 at Koregaon for declaration and consequential relief of injunction. As per the plaint, C.T.S. No.2058/A/1B is the property of the plaintiffs inherited from their father Shankarrao Babaji Barge who died on 11/10/1973. The plaintiffs claim that the land belong to them and was in their possession and the defendant was threatening to disturb their possession by carrying out constructions activities on the same. He has done foundation. Hence, declaration of ownership and perpetual injunction and mandatory injunction was claimed.

3. Defendant No.1 by written statement Exh.32 claimed that by sale deed dated 12/3/1973 Shankarrao Barge had sold to him two properties CTS No.2060 and the suit property. The suit property was wrongly shown as 2059. The said sale deed was executed by Kakasaheb, the son of Shankarrao as the power of Attorney holder and the other legal heirs have confirmed the said transaction. It was claimed that the description of the suit property tallies with the property sold on 12/3/1973. The defendants claimed that they were in possession of the property and subsequently constructed the structure. They had given an undertaking that if the suit is decided against them they would remove the structure.

4. Learned Trial Court as well as the learned Appellate Court on appreciation of facts came to the conclusion that CTS number of the

property shown in the sale Deed Exh.71 was wrong and the suit property was property No.2 from the sale deed as can be identified from the boundaries.

5. Mr. Joshi, learned counsel for the appellants argued that both the lower courts have not properly interpreted the sale deed and correction deed. Even the correction Deed Exh.70 shows the property as CTS No.2061 and not CTS No.2058/A/1B.

6. Per contra, Mr. Thorat, learned counsel for the Respondent No.1 submitted that the documents are not clear in respect of CTS numbers. There are some mistakes and in such cases the boundaries would prevail for identification of the properties. In this regard he relied on the case of *Sheodhyan Singh and Ors. vs. Mst. Sanichara Kuer and Ors., AIR 1963 Supreme Court 1879*.

7. The law in this regard is laid down by the Apex Court in following ruling *Hero Vinoth Vs. Seshammal, (2006)5 SCC 545* wherein it is held as follows:

“25. The principles relating to Section 100 CPC, relevant for this case, may be summarized thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights

of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

8. In *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar & Ors*, (1999) 3 SCC 722 it is held as follows:

"4. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section, The substantial question of law has to be distinguished from a substantial question of fact. This Court in *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.* MANU/ SC/ 0056/ 1962MANU/ SC/ 0056/ 1962 : AIR1962SC1314 held that:-

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absorbed the question would not be a substantial question of law.

5. It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court had given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence.”

9. After considering the arguments and record in the light of the arguments, I find that one Shankarrao Barge was the owner of the suit property and he has executed the sale deed in respect of two properties. The said Sale Deed Exh.71 does not disclose CTS No.2058/A/1B. It shows CTS No.2059 and the correction deed shows CTS No.2061. The description of both the properties i.e. 2059 and 2061 do not tally with the description

of the property at Serial No.2 in the Sale Deed Exh.71.

10. But the Trial Courts as well as the First Appellate Court have given concurrent finding that the description of the suit property tallies with the description given in the Sale Deed. The name of the Respondent No.1 is also mutated in the property extract. He is in possession of the property. The question whether the suit property was sold and whether identification of the property is correct or not is question of appreciation of evidence. Learned Judges have considered the documents on record and relied on boundaries to ascertain the property sold and have arrived at a concurrent finding.

11. It is settled principle of law that when the description of the property sold is not clear from the documents on record, the description from boundaries shall prevail. It is not the case of the defendant that some other property was agreed to be sold and the same is in possession of the plaintiff. After the sale-deed, name of the Respondent No. 1 was mutated in the property extract and he is in possession of the same. Both the lower courts have followed the settled principles of law and have considered the boundaries of the suit plot with the boundaries shown in the sale-deed to arrive at a concurrent finding that the suit property was sold by the Appellant. It is well settled position that this Court cannot interfere with the concurrent finding of both the courts below when it is found that there is no consideration of inadmissible material or rejection of relevant material evidence or perversity. In the light of these facts, I find that there are no reasons to interfere with the concurrent findings of the courts below in exercise of power under S. 100 of the Civil Procedure Code. I do not find substance in the contention that some material documents were not considered or the documents on record were wrongly interpreted.

12. Besides, if the defendants were in possession, the defendants ought to have filed suit for declaration, possession and injunction.

13. Considering the facts, all the substantial questions of law raised are answered in the negative and the appeal stands dismissed. No costs.

(A. M. DHAVALA, J.)