

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 711 OF 2014
WITH
CIVIL APPLICATION No. 1657 OF 2014
IN
SECOND APPEAL No. 711 OF 2014

Mahammad Ibrahim Mirkar	... Appellant/Applicant
Vs.	
Iqbal Ibrahim Mirkar & Ors.	... Respondents

Mr. Kapil Prakash Shetye, Advocate for the appellant/applicant.
Mr. S.S. Redekar, Advocate for respondent nos. 1 to 3.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **10th April, 2018.**

P.C.:

This Appeal is directed against the judgment and order dated 20th September, 2014 passed by the learned District Judge, Ratnagiri in Civil Appeal No. 110 of 2009.

2. The facts, in brief, are as under:

The suit land, i.e., Gat No. 19 at Village Sakhar, District Ratnagiri was owned and possessed by Smt. Hawa Adam Mazgaonkar. It is adjacent land to the creek. The respondents/plaintiffs has filed Regular Civil Suit No. 109 of 2005 for declaration of their title in respect of Gat No. 19. The suit was decreed by order dated 31st July, 2009 passed by learned Civil Judge

Junior Division, Ratnagiri. The said judgment and decree was challenged by the appellants/original defendants by filing Regular Civil Appeal No. 110 of 2009. The said Appeal was dismissed by the judgment and order dated 20th September, 2014 passed by the learned Principal District Judge, Ratnagiri. Against this, the appellants/original defendants have filed the Second Appeal. There is a concurrent finding of the trial Court and First Appellate Court holding that the respondents/plaintiffs are the owners of the suit land.

3. Perused the record and proceedings and the judgments of the Courts below. It is not disputed by the parties that S Smt. Hawa Adam Mazgaonkar was the owner of Gat No. 19. Both the parties claim the ownership and title from Smt. Hawa Adam Mazgaonkar. It is the claim of the respondents/plaintiffs that Hawa Adam Mazgaonkar had one daughter Baya, who got married with one Ahmad Abdulla Mirkar. Ibrahim Ahmad Mirkar was the only son of Baya. Iqbal Ibrahim Mirkar and Maqbool Ibrahim Mirkar, who are the sons of Ibrahim Ahmad Mirkar, are plaintiff nos. 1 and 2. Mumtaz, widow of Ibrahim Ahmad Mirkar, is plaintiff No. 3.

4. It is the case of the appellants/defendants that Ibrahim

Mahammad Mirkar is legally related to Hawa Adam Mazgaonkar and Mahammad Ibrahim Mirkar, who is son of Ibrahim Mahammad Mirkar, is appellant no. 1/defendant No. 1. Khairunnissa Mahammad Mirkar, widow of Ibrahim Mahammad Mirkar, is appellant/defendant No. 2 and Salim Ibrahim Mirkar is appellant no. 3/defendant No. 3.

5. In order to prove the relationship with Hawakom, respondents/plaintiffs have produced Exhibit 50, i.e., Khatauttara of Khata No. 168 and Exhibit 51 dated 6th July, 2007, i.e., Khatauttara of Khata No. 168. On both these Exhibits 50 and 51, name of Ibrahim Ahmad Mirkar is shown. However, there is no documentary evidence produced to show that said Khata No. 168 earlier stood in the name of Hawakom. The learned counsel for the respondents/plaintiffs has produced one document showing that the name of Hawakom stood in Khata No. 168, however, it is not produced in the suit.

6. The appellants/defendants have produced 7/12 extract Exhibit 68 which shows Gat No. 19, i.e., suit land from Vilalge Sakhar was in the name of Mahammad Ibrahim Mirkar, i.e., 7/12 extract of 2004-05. He also relied on Exhibit 69, i.e., extract under section 8A which shows of Khata No. 15 stood in the name of Mahammad Ibrahim

Mirkar of Gat No. 19. However, no year is mentioned on this extract. The learned counsel also relied on Exhibit 8 Mutation Entry No. 601 of the year 1959 where name of Ibrahim Mahammad Mirkar was mutated. How the name of Ibrahim Mahammad Mirkar is mutated is not answered.

7. Both the Courts below on the basis of admissions given by the appellant/defendant Salim Mahammad Mirkar have inferred that Ibrahim Mahammad Mirkar has expired 50 years back, that means, prior to 1959 and may be 1953-54, therefore, how the name of Ibrahim Mahammad Mirkar, who was a dead person, was entered and record was mutated in his name of Gat No. 19 in the year 1959.

8. The learned counsel for the appellants has raised the issue that in the absence of documentary evidence, the trial Court and First Appellate Court ought not to have decided the case in favour of the respondents/plaintiffs. He has submitted that the burden lies on the respondents/plaintiffs to prove on the basis of documents that Ibrahim Ahmad Mirkar is the son of Baya, who got married to Ahmad Mirkar. It is submitted that in absence of any proof, the trial Court and First Appellate Court erroneously jumped to the conclusion that

the respondents/plaintiffs are the successors of Hawakom. He has further submitted that on the basis of absence of proof by the appellants/defendants, the case of the respondents/plaintiffs cannot be proved. In support of his submissions on the point of proof of fact and burden, the learned counsel relied on the judgment of Hon'ble Supreme Court in the case of **Sebastiao Luis Fernandes (Dead) through LRs & Ors. vs. K.V. P. Shastri (Dead) through LRs & Ors., reported in 2015 (2) ALL MR 930 (S.C).**

9. I have considered the submissions of both the parties and the evidence. I am of the view that the evidence produced by both the parties is not sufficient though there is Exhibits 50 and 51 produced by the respondents/plaintiffs when other documents are available connecting Ibrahim Ahmad Mirkar to Hawa Adam Mazgaonkar or Baya Ahmad Mirkar, those documents ought to have been produced before the Court.

10. In the case of **Sebastiao Luis Fernandes** (*supra*), the suit was filed for declaration of title and possession and in the said suit, the plaintiff has to prove the title and satisfy the Court by adducing sufficient evidence. The plaintiff has filed the suit for declaration of

his or her share against the auction purchaser that the auction is not binding to his share because he was not party of the Deed of Mortgage. The trial Court and First Appellate Court held in favour of the plaintiff and the High Court in Second Appeal set aside the orders of the trial Court and First Appellate Court. The said order of Second Appeal was upheld by the Supreme Court.

11. The rule of Evidence Act who asserts has to prove, is a settled principle of law. There are different ways to prove the fact and it is the duty of the Court to find out the truth which is hidden in the pleadings of both the parties on the basis of evidence. The fact can be proved on the basis of oral, documentary as well as circumstantial evidence. There is no hard and fast rule that the fact is to be proved only on the basis of documentary evidence or there must be documentary as well as oral evidence. It depends entirely on facts of the case. The truth can come before the Court through number of facts which are unfolded by the parties by leading evidence in different modes. However, it is also the fact that the parties on some occasions do not lead sufficient evidence though such evidence is available. When insufficient evidence is produced before the Court, it is the duty of the Court to call upon the parties to produce adequate

evidence to arrive at correct conclusion. Though some guesswork is permissible especially in civil cases where the fact can be proved on the basis of preponderance of probability unlike the heavy standard or strict proof of fact, as placed by the prosecution in criminal trials. However, the Court cannot jump on the conclusion, there should be some chain connecting one fact to the other fact. This chain sometimes can be presumed to be established whenever rules of presumption under the Evidence Act are applied. It also can be connected on the basis of judicial notice or the prevailing circumstances, however, these all connecting lines should inspire complete confidence in the mind of the Judge to believe existence of the fact and draw the conclusion.

12. In the present case, as discussed above, undoubtedly the respondents/plaintiffs have to discharge the burden of showing their lineage from Hawakom through Baya to Ibrahim Ahmad. Similarly, if the appellants/defendants claim that they are in possession and have a good title in respect of suit land, then they must show what exact connection they have with Hawakom. A vague statement that they are legal heirs of Hawakom is not sufficient. In view of this, I am of the view that this case is to be remanded to the First Appellate Court

enabling the First Appellate Court to allow the parties to lead further documentary evidence under Order 41 Rule 27 of Code of Civil Procedure on this line. The evidence which is tendered earlier shall be read in the evidence in Appeal, however, additional documentary evidence is to be allowed to adduce to both the parties. The remand is only on short point of production of documents through witnesses. Hence, I pass following order:

- (i) The judgment and order dated 20th September, 2014 passed by the learned District Judge, Ratnagiri is hereby set aside. Second Appeal is remanded to the First Appellate Court.
- (ii) The First Appellate Court is directed to allow the parties to lead additional documentary evidence under Order 41 Rule 27 of the Code of Civil Procedure and prove those documents through necessary witnesses.
- (iii) The Appellate Court may record the evidence itself or may give necessary directions to the trial Court to record the evidence;
- (iv) Registrar (Judicial) is directed to send the Record and Proceedings and the matter to District Court, Ratnagiri on or before 25th April, 2018.

- (v) Parties to appear before the District Judge on 3rd May, 2018 at 11 a.m.
- (vi) The First Appellate Court to do the needful and thereafter decide the Appeal on or before 30th September, 2018.
- (vii) Till 30th September, 2018, the parties to maintain status quo as on today.

13. Second Appeal is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)