

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

***SECOND APPEAL NO.751 OF 2016
WITH
CIVIL APPLICATION NO.1489 OF 2016***

Sambhaji Mahipati Patil and Ors. ... Appellants

Vs

Rajaram Bajirao Gurav ... Respondent

...

Mr. Surel S. Shah with Mr. Datta Pawar and Ms. Sonali Pawar
for the Appellants.

Mr. R.A.Shelke for the Respondent.

CORAM : SANDEEP K. SHINDE J.

DATE : APRIL 11, 2019

P.C. :

It is an appeal preferred by the defendants against the judgment and decree dated 23rd February, 2016 drawn, in Regular Civil Appeal No.161 of 2004 passed by the learned District Judge, Kolhapur.

2 Facts in brief are as under:

The appellants were defendants, in Regular Civil Suit No.72 of 2002, wherein on 10th March 2004 the decree of mandatory injunction was drawn against them. This decree was challenged in

Regular Civil Appeal No.161 of 2004. Pending appeal, defendants amended the Written Statement with the permission of the Court. Resultantly, defendants applied for framing additional issues. The learned Appellate Court vide order dated 21st December, 2010 framed the additional issues in exercise of the powers under Order 41 Rule 25 of the Code of Civil Procedure, 1908 and directed the Ld. Trial Court to render findings on the additional issues.

3 The defendants, led evidence to prove additional issues; however plaintiffs did not. The Ld. Trial Judge vide order dated 6th November, 2014 held that, the additional issues were addressed and answered earlier, in the judgment dated 10th March, 2004 and thus held it, as unnecessary exercise.

4 The learned Appellate Court upon receiving the order dated 6th November, 2014 passed by the learned Civil Judge, dismissed the appeal vide judgment dated 23rd February, 2016, against which this appeal is preferred.

5 Heard learned counsel for the parties.

6 I have perused the judgment in Regular Civil Suit No.72

of 2002 delivered on 10th March, 2004. Following issues were framed by the learned Trial Judge and were answered accordingly:

Issues	Findings
1) Does plaintiff prove his title over the suit property ?	In the affirmative
2) Does the plaintiff prove that defendants have obstructed to his possession over the suit property ?	In the negative.
3) Does the plaintiff prove that defendants have made illegal construction upon the suit property ?	In the affirmative.
4) Is plaintiff entitled for perpetual injunction as sought ?	In the negative.
5) Is plaintiff entitled for mandatory injunction and for possession ?	In the affirmative
6) What order and decree ?	As per final order.

7 The learned Appellate Court in exercise of its powers under Order 42 Rule 25 framed the following additional issues;

Issues	Findings
1) Whether the plaintiffs prove that land R.S.No.319/3 which was owned by them was allotted to defendant in lieu of 0.10 R out of R.S.No.112/3 under the Consolidation Act ?	Redundant
2) Whether the separation of 0.10 R from R.S.No.112/3 allotted in favour of plaintiff under the Consolidation Act is void, illegal and without jurisdiction ?	Redundant

3)Whether the defendants prove alternatively they have acquired title by adverse possession ?	No.
4) Whether the plaintiff prove that they obtained the possession of 0.10 R out of R.S.No.112/3 from the defendants under the Consolidation proceedings ?	Redundant.
5) Whether plaintiff prove that they are in lawful possession referable to title on the date of suit ?	Redundant.
6) Do plaintiffs prove that defendants have obtained possession after filing of this suit ?	Redundant.
7) What order and decree ?	As per final order.

and, called upon the learned Trial Judge to try these additional issues and render the findings thereon.

8 Admittedly, additional issues were framed in view of amendment to the Written Statement at the appellate stage. Obviously, therefore, assertions by the defendants in the amended Written Statement, were not before the learned Trial Judge for consideration while framing the issues. In the given set of facts, the learned Trial Judge was required to render findings on these additional issues. Having not done so, in my view, learned Trial Court has committed material irregularity.

9 That even otherwise issues framed and answered at the first instance, as reproduced hereinabove in para six and additional issues in para seven are distinct and not overlapping each other. Say Additional issue nos. 1, 2 & 4 relates to effect of consolidation Act vis-a-vis suit land which were not before the trial court for consideration at first instance.

10 Thus, taking into consideration facts of the case, impugned judgment and decree dated 23rd February, 2016 passed in Regular Civil Appeal No.161 of 2004 by the District Judge-4, Kolhapur is set aside and Appeal is restored to the file.

11 The learned Joint Civil Judge, Junior Division, Panhala is directed to try the additional issues framed in terms of the order dated 21st December, 2010 passed in Regular Civil Appeal No.161 of 2004 and render the findings afresh after affording opportunity of being heard to the plaintiffs and defendants.

12 Parties to the appeal are directed to remain present before the learned Civil Judge, Junior Division, Panhala, District: Kolhapur on 26th June, 2019 as required under Order 41 Rule 26A

of the Code of Civil Procedure, 1908.

13 The learned Joint Civil Judge, Junior Division, Panhala shall render the findings on additional issues within six months from the date of appearance of the parties before the Trial Court who shall forward the findings on the additional issues, to the learned Appellate Court in Regular Civil Appeal No.161 of 2004.

14 The learned Appellate Court shall decide the Regular Civil Appeal No.161 of 2004, upon receiving the findings on the additional issues from the learned Trial Judge as expeditiously as possible and preferably within six months therefrom.

15 It is expressly agreed by the parties that they shall not lead evidence on the issues, which are already answered by the learned Judge.

16 Appeal is disposed of in aforesaid terms.

(SANDEEP K. SHINDE, J.)