

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

Second Appeal No.394/2019
Jaswantabai Motghare & Ors. Vs. Sutradhari Shende

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

Court's or Judge's orders

Mr. A.A.Dhawas, Advocate for appellants
Mr. Y.J. Maheshwari, Advocate for respondent

CORAM : MANISH PITALE, J.

DATED : OCTOBER 04, 2019

The appellants herein are the original defendants, who have filed this appeal challenging the impugned judgments and orders passed by the two Courts below, whereby the suit filed by the respondent (original plaintiff), for declaration and possession was decreed.

2. In the present case, it is undisputed that neither the respondent nor the appellants can claim any title in the suit property. Both the parties could at best claim to be encroachers upon Government land. The parties in the first instance in the year 1996 had filed suits against each other seeking injunction on the ground that they were in possession of the suit property. The two suits were decided by common judgment by the Competent Court, wherein it was found that the respondent was in possession of the suit property and that the appellant and her husband

could not prove their claim of being in possession thereof. The appeals filed against the common judgment and order were dismissed and thereupon the second appeal by the appellants in this Court also stood dismissed by order dated 12/10/2007 in Second Appeal No.560/2005, whereby the findings rendered by the two Courts below stood confirmed. Therefore, a finding of fact was rendered by the Court in favour of the respondent to the effect that he was in possession of the suit property.

3. In this backdrop, the facts leading to filing of the present second appeal are that the respondent filed suit bearing Regular Civil Suit No.12/2009, before the Court of Civil Judge (Jr.Dn.), Lakhandur (Trial Court), contending that the appellants had illegally dispossessed the respondent from the very same suit property and that such dispossession was forcible. Accordingly, declaration was sought by the respondent that the defendants had no right to take forcible possession of the suit property and further that such action of the appellants was in violation of the aforesaid earlier orders passed in favour of the respondent. On this basis, a decree for possession was sought by the respondent.

4. The Trial Court by its Judgment and order dated 05/3/2015, found that the respondent had been able to prove that the appellants had forcibly

dispossessed him from the suit property in June 2006 and that he was entitled to the declaration sought by him and on that basis, decree of possession was granted in favour of the respondent. An appeal filed by the plaintiff before the District Judge, Bhandara (Appellate Court), was dismissed by judgment and order dated 27/02/2018, whereby the decree granted in favour of the respondent was confirmed.

5. The learned counsel for the appellants submitted that substantial question of law arose in the present appeal to the effect that the Trial Court in the present case wrongly deleted two crucial issues at the time of delivering judgment, thereby causing grave prejudice to the appellants and further that the suit itself was not maintainable for non-joinder of the Government as defendant, despite specific statement made in the plaint on behalf of the respondent that the land in question was Government land.

6. In so far as the question pertaining to the deletion of issues by the Trial Court is concerned, a perusal of the judgment and order of the Trial Court shows that the two issues that were deleted pertained to the question as to whether the respondent had proved that he had encroached upon the suit property and he was in peaceful cultivating possession and further as to whether the appellants had proved that they had been in peaceful cultivating possession of the

suit property for last 25 – 30 years. According to the learned counsel for the appellants, deletion of the said issues was an error committed by the Trial Court, which caused prejudice to the appellants.

7. But, in the face of fact that in the earlier round of litigation where suits filed by rival parties against each other were decided by the competent Civil Court by common Judgment and order holding that the respondent had proved that he was in possession of the suit property and the claim of possession made by the appellants was negated, which finding stood confirmed up to this Court, it becomes clear that there was no necessity in the first place for the Trial Court to have framed such issues. Therefore, deletion of the same could not be said to be erroneous and it could not be said by any stretch of imagination that any prejudice was suffered by the appellants. In that context, there is no substance in the aforesaid contentions raised on behalf of the appellants.

8. As regards, the second question sought to be raised on behalf of the appellants, that the suit filed by the respondent was not maintainable due to non-joinder of the Government as defendant, it is an admitted position that in the present case neither of the parties have claimed ownership or title in the suit property. In the first round of litigation as well as present round, the parties have proceeded on the basis

that Government is the actual owner of the suit property. In other words, it was one encroacher against another and the limited question of enquiry in the suit filed by the respondent was as to whether he was forcibly dispossessed by the appellants in the teeth of the orders which recognized possession of the respondent in the suit property. In such circumstances, it could not be said that the suit filed by the respondent was not maintainable in the absence of the Government being defendant. The learned counsel for the respondent is justified in relying upon the Judgment of the Hon'ble Supreme Court in the case of **Nair Services Society Ltd. Vs. K.C. Alexander and others AIR 1968 Supreme Court 1165**, wherein the Hon'ble Supreme Court has clearly held that between such claimants neither of whom claim title in the suit property, the plaintiff if dispossessed is entitled to recover possession subject to law of limitation. In the said Judgment observations have also been made as regards necessity or otherwise of making true owner a party to such a litigation and it has been held that such course is not necessary to be adopted.

9. In view of the above, this Court is of the opinion that no substantial question of law arises in the present appeal and accordingly, it is dismissed.

10. Needless to say, this Court has refrained from commenting on any documents sought to be

placed on record by the appellants other than the documents that were already on record.

JUDGE

MP Deshpande