

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.300 OF 2018
WITH
CA/5580/2018 IN SA/300/2018
WITH
CA/12459/2019 IN SA/300/2018
WITH
CA/2101/2022 IN SA/300/2018**

Karbhari s/o. Gopala Pavbake
Age : 61 years, Occu: Agriculturist
and Pensioner, R/o. Pavbaki Road,
Ghulewadi, Tq. Sangamner,
Dist. Ahmednagar.

... **APPELLANT**
(Org. Plaintiff)

VERSUS

1. Uttam Marlidhar Pavbake,
Age : 73 years, Occu: Agri
2. Dattatraya Uttam Pavbake
Age : 65 years
3. Sanjay Uttam Pavbake
Age : 42 years, Occu: Agri.
4. Babasaheb Uttam Pavbake
Age : 28 years, Occu: Agri.
5. Sunil Uttam Pavbake,
Age : 35 years, Occu: Agri.
All R/o. Pavbaki Road,
Ghulewadi, Sangamaner,
Tq. Sangamner, Dist. Ahmednagar.

(dead - deleted as per order
dated 31.07.2018)

... **RESPONDENTS**
(Org. Defendants)

...
Advocate for Appellant : Mr. A.S. Bajaj
Advocate for Respondent Nos.1 to 4 : Mr. V.Y. Bhide
...

CORAM : MANGESH S. PATIL, J.
Reserved on : 09.02.2022
Pronounced on : 18.02.2022

ORDER :

Heard the learned advocates of both the sides.

2. By the order dated 18.09.2018 while admitting the Second Appeal, following substantial questions of law were formulated after hearing both the sides:

“[i] Whether the first appellate court exceeded its jurisdiction under Section 96 of the C.P.C. in setting aside the reasons and findings recorded by the trial court ?

[ii] Whether the reasons and the findings recorded by the trial court suffer from any perversity so as to call for interference in exercise of appellate jurisdiction by the appellate court ?”

3. With a view to avoid any confusion the parties are hereinafter referred to by their status in the suit. The facts leading to the filing of this Second Appeal may be summarized as under :

- i) The plaintiff filed a suit for perpetual and mandatory injunction with the averment that the lands survey No.218/4A/6 and 218/4C/11 more particularly described in paragraph No.1 of the plaint were the ancestral properties which were allotted to his father in a partition. The defendant No.1 is the cousin nephew and the other defendants are his sons. In spite of such partition his father had permitted the defendants to use the portion admeasuring

41 feet north-south and 17 feet east-west from the south-west corner of their lands for their residence. Except such portion of permissive use the defendants had no right or share in the remaining portion of the lands allotted to his share. However, they started encroaching and obstructing a portion beyond their house admeasuring 41x17 feet and even erected some construction. Hence he prayed for perpetual injunction restraining defendants from carrying out any construction in the portion lying to the north-west corner, adjacent to the streamlet which was subsequently converted into a public road from Sangamner to Pavbake situated to the west of these properties and mandatory injunction for removing the construction of a platform carried out to the north of their house property beyond 41x17 feet portion.

- ii) The defendants contested the suit by their written statement-cum-counter claim. They did not dispute that the plaintiff was the owner of the properties described in the plaint but denied that their house situated within the properties of the plaintiff or that their predecessors were in permissive possession of 41x17 sq. feet portion. They contended that during the partition, land survey No.218/4A/5 was allotted to the share of their grandfather and since then they have been in exclusive possession thereof. Their house situated within

the property allotted to them. They further denied that the plaintiff had any right or access by use of the northern side open portion lying to the north of their house property. They further denied to have carried out any construction within 15 to 20 years next before the suit. They then contended that the plaintiff was bent upon to obstruct and even made an attempt to remove the wall situated between their house and his house erected on the northern side and claimed perpetual injunction.

- iii) Necessary issues were framed. The plaintiff led evidence by examining himself and three other witnesses including a photographer. The defendants though cross-examined the plaintiff's witnesses they avoided to step into the witness box and were satisfied in examining the very same photographer who had snapped few other photographs at their instance.
- iv) At the conclusion of the hearing, the learned judge of the trial court decreed the suit but dismissed the counter claim.
- v) The defendants challenged the judgment and decree of the trial court in appeal before the District Court. By the judgment and order under challenge the Appeal has been partly allowed. The decree was quashed and set aside but simultaneously the appeal to the extent of challenging the judgment of the trial court dismissing the counter claim was

also dismissed. Hence this Second Appeal.

4. The learned advocate Mr. Bajaj for the appellant would vehemently submit that though the appellate court has made an attempt to create confusion as to the location of the disputed property, it miserably failed to appreciate the entire facts and circumstances those were available on the record including the fact that the defendant No.1 during pendency of the suit had filed a separate suit bearing RCS No.171/2006 wherein, he had described the disputed site and had sought perpetual injunction restraining the plaintiff from obstructing his possession over the self same property which is a property in dispute in the matter in hand. He would precisely point out that in spite of the trial court having referred to the description of the property in that suit with the rough sketch annexed thereto in its judgment, the appellate court even miserably failed to notice it which was a material piece of evidence which could have avoided any confusion in the mind of the learned Judge. He therefore would submit that the observations and conclusions drawn by the appellate court are grossly perverse and arbitrary.

5. Mr. Bajaj would then submit that though the appellate court has readily drawn an adverse inference against the plaintiff merely because of his refusal to reply an irrelevant question, it has conveniently overlooked the conspicuous absence of the defendants from the witness box. The trial court had rightly drawn an adverse inference against the defendants on this count but the appellate court even refused to take its cognizance.

6. Mr. Bajaj would then submit that though the photographs were produced by both the side on the record the appellate court did not take any pains to minutely scrutinize these photographs and to understand the situation at the spot by appreciating the scenes depicted by these photographs. He would therefore submit that a well reasoned judgment and decree passed by the trial court giving plausible reasons and on correct appreciation of the evidence has been quashed and set aside merely for asking. The observations and conclusions of the appellate court are clearly perverse and arbitrary. There was no sufficient and cogent reason for it to quash and set aside the judgment and decree of the trial court and the substantial questions formulated in this Second Appeal may be answered in favour of the plaintiff.

7. Mr. Bajaj then submitted that though at a belated stage, realizing the confusion as regards the identity of the property in dispute, Civil Application No.2101/2022 has been filed although the matter is reserved for final decision. He would submit that the documents sought to be produced are all certified copies of the public documents in the form of certified mutation entries showing as to how the two branches originating from the common ancestor Dhondiba received separate portions of lands which stood mutated in their respective names for years together. Besides being the certified copies of the public documents, they are relevant and necessary for adjudication of this Second Appeal and may be allowed to be produced and read in evidence as no other evidence is required to prove

those documents.

8. The learned advocate Mr. Bhide for the defendants vehemently submitted that since the plaintiff was claiming a perpetual and mandatory injunction, it was imperative for him to have annexed rough sketch to the plaint as is required by Order VII Rule 3 of the Code of Civil Procedure (Bombay High Court amendment). Mr. Bhide would then submit that accepting the evidence led by the plaintiff as it is, one cannot make out and identify the property in dispute. He falsely asserted that the Sangumner - Pavbke road is adjacent to his property to the west when the house of the defendants situates between that road and the plaintiff's house. This was precisely noticed by the appellate court while holding that he had miserably failed to precisely point out location of the suit property. The trial court had grossly erred in understanding the dispute and the error was corrected by the appellate court.

9. Mr. Bhide would lastly submit that the appellant is seeking to produce documents at second appellate stage and the application is absolutely devoid of any reason or ground showing as to why those were not produced at any earlier point of time. Therefore, the production may not be allowed.

10. I have carefully considered the rival submissions and perused the record and the proceeding. Bearing in mind the nature of the controversy apparently the dispute revolves around identity of the property in dispute. By holding that the plaintiff has failed to come out with a proper

description of the suit property, the appellate court has reversed the judgment and decree passed by the trial court. I feel it would be appropriate to take up this very controversy at the inception.

11. Taking up the Civil Application No.2101/2022, true it is that the documents sought to be produced are all of the certified copies of public documents vis the mutation record maintained by the Revenue Office. Needless to state that no other proof is required to prove such certified copies of public documents. It is equally true that the plaintiff could have produced this on record not only at the trial stage but even before the first appellate court but had failed to do so. But then besides being certified copies of public record which are admissible per se, the defendants cannot be said to be having any grievance in as much as this is a mutation record demonstrating as to how both the branches originating from common ancestor Dhondiba had received the shares in the ancestral and joint family properties. There is no dispute about genealogy, the plaintiff belongs to the branch of Gopala who was one of the two sons of Dhondiba whereas the defendants claim through the other son of Dhondiba by name Govinda. Therefore, it cannot be said that any prejudice is likely to be caused to the defendants when in all probability even they must be having the knowledge about the existence of such long standing revenue record right from the year 1942. Therefore though belatedly, when the documents sought to be produced are certified copies of public record which is admissible in evidence per se and when it refers to the mutations that have taken place

from time to time including in respect of the property in dispute, the production deserves to be allowed. The Application therefore is allowed.

12. It is apparent that the plaintiff has given the description of his properties which are two pieces of land one of which according to him extends up to the Sangamner - Pavbake road which situates to the west of his property. Much capital has been tried to be made up by the defendants and even that stand seems to have weighed with the lower appellate court that though the plaintiff has described that this road situates to the west of his property, in fact, the house property of the defendants intervenes that road and the house property of the plaintiff. I am afraid, no such inference was deducible from this fact of the house property of the defendants intervening the western side road and the rest of the property of the plaintiff situated to the east of the defendants house. This is what has been specifically pleaded by the plaintiff. He specifically asserted that the property that was allotted to his share extended up to the western side Sangamner - Pavbake road. He specifically asserted that merely by way of some concession that the predecessors of the defendants were allowed to continue to occupy 41x17 feet portion for their use as a residence that too to the south-west corner. This clearly indicates that the plaintiff in his testimony and his pleading never created any confusion as far as the location of the defendants house and his own house with reference to the Sangamner - Pavbake road.

13. In all probability, the appellate court would not have fallen in

the error in giving so much of weight to these facts and circumstances had it carefully and minutely considered the averments in the plaint as also the rough sketch annexed thereto in R.C.S. No.171/2006 which was filed by the defendant No.1 against the present plaintiff that too after the present suit was filed by the latter. In fact, the trial court in paragraph No.29 of its judgment had clearly referred to the description given by the defendant No.1 in his suit, whereby, precisely indicating that the present plaintiff was obstructing his possession over the northern side squarish portion within which admittedly a Temple in the form of a platform and a deity exists to the north-west corner which is bound by the same Sangamner-Pavbake road and the internal road which the defendant No.1 described A,B,C,D, to the north of the house properties. After carefully understanding the matter in controversy when the trial court in the context of this stand of the defendant No.1 in a separate suit had reached a reasonably plausible conclusion that it is that squarish portion to the north west corner abutting Sangamner - Pavbaki road from east and abutting the internal road of the northern side which situates in right angle to Sangamner - Pavbake road described in the plaint of the defendant No.1, it was expected of the lower appellate court to have been more careful and considerate of the evidence that was available on the record and was referred to by the trial court. Failure to do so has clearly landed it in committing a gross error in reaching to a perverse conclusion regarding absence of evidence to mark precisely the property in dispute. To my mind, the trial court had correctly undertaken the exercise,

scrutinized the evidence that was available before it and had reached a correct conclusion that the dispute was pertaining to this very piece of land and there was no confusion in the minds of the parties.

14. In this regard it is pertinent to note that the defendants are not seriously disputing about allotment of different pieces of land to the two separate branches headed by Gopala and Govinda who were the two sons of Dhondiba. The plaintiff has described the suit property as a portion of the lands allotted to the share of Gopala, his grandfather. The Mutation Entry No.4474 dated 09.09.1943 clearly indicates that Gopala was *inter alia* allotted the lands Survey No.854/4A and 854/4C and no portion from that piece of land was ever allotted to Govinda who was the predecessor of the defendants. They have also not raised any dispute that the suit property is not the piece and parcel of the lands Survey No.218/4A and 218/4C as is averred by the plaintiff. Precisely for this reason, even while describing the suit properties in their Suit RCS No.171/2006, they specifically mentioned that this disputed site, which they described as suit property 1-C admeasuring 2014 sq. meters, is a part of Gat No.218/4A/6 which had never fallen to the share of their predecessor Govinda. Therefore, there is absolutely no confusion as regards the identity of the property in respect of which the plaintiff has been claiming the relief.

15. Similar is the case in respect of the adverse inference drawn by the lower appellate court merely because the plaintiff during his cross-examination refused to answer one question. When it was asked to him that

because of creation of Sangamner - Pavbake road in place of the earlier streamlet the prices of the properties have gone up and that is the reason he was claiming a right over the disputed portion. True it is that he did not reply to this question. It is equally true that the trial court did not refer to it. But then this being a civil proceeding, the motive or intention of a party would hardly be of any significance. Assuming for the sake of arguments that the dispute has arisen with the rise in the potential of the property, one need not get swayed away. The crux of the dispute of a civil nature would lie in the veracity or otherwise of the stand of a party based on the evidence that is led on the record. At the most what inference could have been deduced from such silence of the plaintiff is that he had indeed become greedy because of the potential of the property to fetch a higher price, nothing beyond that. Accepting this analogy drawn by the lower appellate court, this inference is of no help to draw any other inference much less regarding proof or otherwise of the right and title to the suit property.

16. Astonishingly, though the lower appellate court was prompt enough to draw such an inference merely because the plaintiff had refused to give any answer to the question, it does not seem to have borne in mind the other vital circumstance which was weighing in favour of the plaintiff. Conspicuous absence of the defendants from the witness box was indeed a very vital and clinching circumstance, bearing in mind the nature of the dispute and all the aforementioned facts and circumstances. The trial court had correctly referred to and had drawn some adverse inference against the

defendants which the lower appellate court miserably failed to notice and draw.

17. Interestingly, the lower appellate court has also not taken efforts to point out as to what error was committed by the trial court in firstly, referring to the contents of the plaint and the rough sketch annexed to it in a suit filed by the defendant No.1 after the present dispute had arisen. Similarly it has also failed to comment upon much less analyze the reasoning of the trial court to draw adverse inference against the defendants for avoiding to grace the witness box. Taking into account the fact that it is a civil dispute, the trial court was clearly justified in drawing inference as to the proof of the disputed facts based on the evidence that was led before it and simultaneously drawing inferences from all the attending facts and circumstances, which course was indeed imperative.

18. As against this, the lower appellate court in a superfluous manner seems to have got swayed away by some irrelevant considerations or the considerations which did not have bearing on the matter in controversy.

19. One more instance of the approach of the lower appellate court which is indeed eye catching is about the fact that though according to the plaintiff some sort of construction has been carried out in the disputed piece of land by the defendants and even when the defendant No.1 in his suit specifically averred that the present plaintiff was bent upon to obstruct his possession and had started demolishing that construction, the appellate

court has reached a conclusion about the plaintiff having failed to prove that the defendants had carried out certain construction and fitted iron grill in the disputed portion and even simultaneously further held that the defendants have failed to prove about the plaintiff having threatened to demolish the construction. This circumstance is clearly indicative of the confusion in the mind of the lower appellate court as to the real nature of the matter in controversy.

20. In view of the above state of affairs, when there was no sufficient and cogent reason for causing any interference in the well reasoned judgment and decree passed by the trial court, the appellate court having caused inference without undertaking requisite scrutiny of the facts, circumstances and evidence, it indeed exceeded the jurisdiction and has reached the conclusion which is clearly perverse, arbitrary and capricious. I, therefore, answer both the points accordingly.

21. In the result the Second Appeal succeeds and is allowed. The impugned judgment and order passed by the lower appellate court to the extent it allowed the challenge to the decree passed in favour of the plaintiff and dismissing the suit, is quashed and set aside and the one passed by the trial court is restored.

22. Pending Civil Applications are disposed of.

(MANGESH S. PATIL, J.)