

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.164 OF 2012
WITH
CIVIL APPLICATION NO.397 OF 2009
IN
SECOND APPEAL NO.164 OF 2012**

Shri. Harichandra Vithoba Pednekar ...Appellant

vs.

Shri Jagdish Shankar Bhovar And Ors. ...Respondents

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Mr. Valmiky H. Narvekar, a/w. Mr. M.N. Gawankar, for the Appellant.

Mr. A.S. Khandeparkar, a/w. Mr. Saurabh Mittal and Mr. Apoorva Khandeparkar, i/b. Khandeparkar & Associates, for the Respondents.

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CORAM : NITIN W. SAMBRE, J.

DATED : 10 OCTOBER, 2022

P.C.:

This second appeal is preferred by the original plaintiff.

2. Regular Civil Suit No.62 of 2002 is filed on 28 August 2002 seeking declaration of ownership and injunction. The suit came to be decreed on 29 September 2005 by judgment and order delivered by Joint Civil Judge, Junior Division, Kudal. The Respondents/defendants felt aggrieved and preferred Regular Civil Appeal No.181 of 2005 before District Judge-I, Sindhudurg at Oras. The appeal came to be allowed by impugned judgment and order dated 22 January 2008.

As such, this second appeal.

3. The facts necessary for deciding the present second appeal are as under:

Suit property consist of agricultural land Survey No.43, Hissa No.12, which allegedly was given Gat No.561 after the consolidation scheme at village Sarambal was implemented.

4. It is the case of the Appellant that he has perfected his title to the suit property vide purchase deed dated 6 June 1905 (Exhibit 64). Exhibit 64 is a purchase deed in Modi lipi and the translation of the same is given in Exhibit 65 in Marathi.

5. Alleging that the Respondents/defendants are interfering with the settled possession of the Appellant, the cause was brought before the trial court.

6. Amongst other, the claim put forth by the Appellant so as to establish his case is, plaintiff nos. 1 and 2 interse, based on respective titles, agitated their claims over the suit property in Regular Civil Suit No.54 of 1912-13 before the Court of Munsif at Kudal. The said suit was in relation to the very same property as that of in this appeal which was decided on March 17, 1913. It is claimed that once the Appellant has perfected very title not only by the sale deed Exhibit 64 but also by

the judgment and decree in aforesaid suit, being Regular Civil Suit No.62 of 2012, the Respondents were not having any right, title to disturb the possession.

7. The Respondents disputed the claim of the Appellant based on deed at Exhibit 64. The title document is not complete one, as the said title document does not contain the description of the suit property. It is claimed that a certified copy of the title document dated 6 June 1905 was produced before the Court, based on which the claim was registered vide Exhibit 21, which was permitted to be produced before the record of the appellate court.

8. The trial court accepted the claim put-forth by the Appellant of having title over the suit property and decreed the suit. The first appellate court, in exercise of the powers under Section 96 of the CPC, reversed the decree based on Exhibit 21, the certified copy of the Exhibit 64, title document of the Appellant/plaintiff.

9. The Counsel for the Appellant has made two-fold submissions:

- (a) The appellate court committed an error of law in not following the very procedure laid down under Order 41 Rule 27 of the CPC while permitting the production and analysis of the certified copy of the document title deed, i.e. Exhibit 64.
- (b) His next contention is, the appellate court has failed to consider

the effect of decree delivered in Regular Civil Suit No.54 of 1912-13 which was interse between the plaintiffs.

- (c) His next contentions is, title of the Appellant over the suit property was never disputed in the written statement and as such the decree goes beyond the pleadings.

10. Mr. Khandeparkar, Counsel appearing for the Respondents/defendants, would oppose the prayer, as, according to him, all these issues are duly taken care of by the appellate court. According to him, the detail reading of the appellate court's judgment will give correct impression as to the failure of the Appellant to establish his case of not having title over the suit property.

11. I have appreciated the submissions.

12. The fact remains that the suit for declaration of title/possession and order of injunction is based on a title deed Exhibit 64 and 65. The said title deed is of 6 June 1905. The said document, as is rightly so claimed by the Counsel for the Appellant, was duly considered and dealt with in Regular Civil Suit No.54 of 1912-13, which was interse between plaintiff no.1 and plaintiff no.2. The said suit was decided on March 17, 1913.

13. However, the decree passed in the aforesaid suit of 1912 will not bind the present Respondents/defendants, they being not party to the said proceedings.

14. The perusal of the analysis of facts and evidence expressed by the appellate court reveals that the sale deed Exhibit 64 was incomplete in its entirety, as the important portion of said document, which reflects the details about suit property, was not available, as the said part of document was destroyed. Same has prompted the appellate court to consider Exhibit 21, certified copy of the sale deed dated 6 June 1905, i.e. Exhibit 64. Exhibit 21, the certified copy, was permitted to be produced on record at an appellate stage, pursuant to the provisions of Order 41 Rule 27 of the CPC. It is claimed by the Counsel for the Appellant that said provision could have been invoked only after permitting the Appellant to lead appropriate evidence in support to resist claim of the Respondents. However, the Court is required to be sensitive to the provisions of Order 41 Rule 27 (1)(b). The said provision reads thus:

“27. Production of additional evidence in Appellate Court.- (1)
The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.”

15. The provision of Order 41 Rule 27(1)(b) of C.P.C. contemplates and gives power to the appellate court to permit a party or direct a party to produce such document, which in its discretion deem it

appropriate to be permitted to be produced on record for proper adjudication of the suit claim, which was brought before it.

16. Objection, if any, to such document (Exhibit 21), which is admittedly a certified copy of a document Exhibit 64, should have been raised at 1st Appeal stage and not in present proceeding. The record rather depicts a fact that the Appellant has not disputed the document Exhibit 21. That being so, no fault could be noticed qua non-compliance of the provision of Order 41 Rule 27(1)(b) of CPC, as has been claimed by the Appellant.

17. The appellate court, while comparing the details of the property, which was transacted vide Exhibit 64, has noted that the property mentioned in Exhibit 64 does not match with that of the suit property. While recording such finding of fact, the first appellate court has relied on the admitted document Exhibit 21, a certified copy of Exhibit 64.

18. In the aforesaid background, the claim put forth by the Appellant that the judgment of the appellate court goes contrary to the scheme of Order 41 Rule 27 of CPC is without basis. As such, said contentions are also rejected.

19. As far as the last contention as regards the absence of plea on the part of the Respondents/defendants questioning the title of the

present Appellant is concerned, the trial court has framed the issues at Exhibit 18. The Issue No.1 specifically deals with title of the Appellant over the suit property. Once the suit property, which is described in the plaint, does not matches with that of the one in Exhibit 64, the title document, over which the case was based, the court below was justified in recording a finding of fact that the Appellant has failed to establish the title over the suit. The appellate court, while dealing with the issue No.1, has rightly considered the plea that whether the Appellant has established that the suit property is the very property purchased vide Exhibit 21/Exhibit 64 and answered the issue against the Appellant. The said answer by the appellate court is based on the reasons narrated hereinbefore.

20. In this background, I hardly notice any involvement of question of law in the present appeal. The appeal as such is dismissed.

21. In view of the disposal of the second appeal, nothing survives in the civil application and the same is disposed of.

(NITIN W. SAMBRE, J.).