

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.61 OF 2020
WITH
CIVIL APPLICATION NO. 20 OF 2020
IN
APPEAL FROM ORDER NO.61 OF 2020

Nirmalaben Shambhuprasad Patel, .. Appellant
deceased and ors

Versus

Shri Chandrahas Jethalal Patel and anr .. Respondents

...

Mr.D.S. Mhaispurkar with Mr.Sameer Mangaonkar for the appellants.

Mr.Devendranath S. Joshi for the respondent no.1.

CORAM: BHARATI DANGRE, J.
DATED : 25th APRIL, 2022

P.C:-

1 Heard the learned counsel for the appellant and learned counsel for respondent no.1 who is the contesting respondent.

 The present Appeal is filed, being aggrieved by the decision of District Judge-5, Kalyan on 28/3/2018 in Civil Appeal No.26/2001, thereby setting aside the impugned

judgment and decree dated 19/10/2000 passed in RCS No.278/1996 by the 2nd Civil Judge, Jr. Division, Kalyan.

2 The appellant is the plaintiff, who instituted a Suit for declaration and possession, by asserting that the plaintiffs are the absolute owner of the immovable property, situated at Village Mohone, Taluka Kalyan, Thane, located in Survey No.1, Hissa No.3/3/C and the property was admeasuring 15 gunthas and 9 gunthas subjected to 2 distinct assessment. When the said property was under construction, the defendant no.1 without permission and consent of the plaintiff, encroached upon the said property by constructing a structure admeasuring 3 ft x 6 ft with brick cement, sand etc. It was also pleaded that adjacent to the said construction, the defendant no.1 has encroached on an area admeasuring about 2ft x 1½ft and also constructed one otta admeasuring 2 x 1. This encroachment was alleged to be in the private property of the plaintiffs and their tenants who were in use and occupation of the said property, described in paragraph no.1 of the plaint. The plaintiff, therefore, sought a relief to the effect that they shall be declared as absolute owner of the suit property described in paragraph no.1 and the defendant be ordered and decreed to hand over physical possession of the suit property to the plaintiff.

The said Suit was adjudicated by Civil Judge, Kalyan by settling the following issues :-

- “(1) Does plaintiff prove that their exclusive ownership over the suit property?*
- (2) Does they further prove the encroachment by the defendant as disclosed in para 3 of the plaint?*
- (3) Is they entitled for declaration, possession and mandatory injunction as prayed ?*
- (4) Does defendant prove that he became owner of the suit property by adverse possession ?”*

3 The above issues came to be decided in the wake of the evidence of the plaintiff who examined plaintiff no.3 in support of the claim and one Shri Ashok Sahebrao, Clerk in the office of TILR. The defendant no.1 examined himself and defendant no.2 also entered into the witness box.

 In the wake of the material placed before him, the learned Civil Judge specifically recorded that the plaintiffs are the owners of the suit property of Survey No.1, Hissa No.3/3/C and did not accept the case of the defendant no.1 that the plaintiffs are not it's owners and he is the owner by adverse possession. The plaintiffs placed on record two distinct sale deeds in relation to the suit property i.e. Survey No.1, Hissa No.3/3/C and also relied upon the documents to demonstrate that the suit property stood mutated in their name by various mutation entries.

Since the defendant did not examine any independent witness nor produce on record any cogent evidence to show that Survey No.1, Hissa No.3/3/C belong to him and he made construction of the said portion in the year 1960 after obtaining the necessary permission as juxta posed, the evidence brought on record by the plaintiff, establishing the ownership of the suit property, the declaration was granted in favour of the plaintiff.

Resultantly, since neither the ownership nor possession in form was proved by the defendant, the Suit came to be decreed along with the aforesaid declaration of ownership and defendant was directed to hand over vacant possession of the suit property after removing the alleged construction, to the claimants within a period of two months.

4 On an Appeal being instituted, the Appellate Court has referred to a report of the Court Commissioner at Exhibit-64. The learned respective counsel are at consensus that the said report is not a report pertaining to the suit property and in fact, the said report was prepared in RCS 562/1991.

Mr.Joshi, learned counsel for the respondent, fairly state that the Appellate Court has committed a mistake in light of the said report and in fact what ought to have been relied upon, was a report at Exhibit-70, though the fact remains that the Court Commissioner was not examined, but still the report came to be

exhibited. The question that arises is, whether it can be read in evidence as a proof of its contents, in absence of any person being examined, is a matter to be determined by the trial Court. However, since a wrong report of the Commissioner has been referred to, this itself justify the matter to be remanded.

5 Apart, the learned Appellate Court also deemed it expedient to remand the matter back with liberty to the plaintiff to show by rough map or sketch, approximately as possible the exact location and the extent of the encroachment of the plaintiff and also examine the Officer or any Officer in absence of TILR and in order to prove that there was encroachment on the suit property.

Pertinent to note that a Suit being filed under Order 7 Rule 3, it was incumbent upon the plaintiff to have filed a map of the suit property, particularly when he has alleged that there was encroachment of the defendants on some portion of the suit property.

6 The Appellate Court, however, cannot be said to be in any case at fault, in remanding the matter back to the trial Court in the wake of paragraph no.2 of it's order, dated 28/3/2018.

Observation in the impugned order, to the effect that since if the plaintiffs suit has to be decreed, it will have to show the exact location of the suit property in the entire survey number and particularly, the encroached portion, the proceedings deserve

to be remanded back to the trial Court. Since the impugned judgment of the 2nd Jt. Civil Judge, Jr. Division, Kalyan is already set aside and the matter is to be decided afresh in the wake of the directions of the Appellate Court, the trial Court shall conclude the proceedings in the Regular Civil Suit within a period of six months from today.

7 All the contentions of the parties shall be taken into account before adjudicating the proceedings in the said Suit and the trial court is at liberty to permit leading of additional evidence, if it deem it necessary.

Appeal is disposed as above.

In view of the disposal of AO, Civil Application No.20 of 2020 do not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)