



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 99 OF 1995
WITH CA/1416/1995

Sau. Dr. Vimal Uttamrao Dhere,
Age Major, Occ: Medical Practitioner,
R/o. Rashin, Tq. Karjat,
Dist. Ahmednagar

...Appellant
(Orig. Defendant)

Versus

Maruti Bhau Kale,
Age Major, Occ. Agri,
R/o. Kalewadi Rashin,
Tq. Karjat, Dist. Ahmednagar

...Respondent
(Orig. Plaintiff)

...
Mr. P. S. Dighe h/f Mr. V. R. Dhorde, Advocate for
Appellants

...

CORAM : R.M. JOSHI, J
RESERVED ON : JANUARY 22, 2024
PRONOUNCED ON : FEBRUARY 01, 2024

JUDGMENT :

1. This appeal is filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree dated 23.08.1994 passed in RCA No. 38/1988 whereby the judgment and decree passed by the Trial Court in RCS No. 64/1985 dated 30th December, 1987 is reversed. This suit was dismissed by the trial Court, which came to be decreed by the First Appellate Court.

2. Parties are referred to by their nomenclature in the original proceedings for the sake of convenience.

3. Facts which led to the filing of the present appeal can be summarized as under:

Plaintiff filed suit for simplicitor injunction restraining Defendant from obstructing his possession over 3R land from survey nos. 81/2B (Old Survey No. 120) towards western side of Jagdamba Hospital. It is the case of the Plaintiff that Old Survey No. 120 was owned and possessed by him with co-sharers. The said land admeasured 1H 86R. Out of the said common land, Plaintiff purchased 1½ Acre land from Shankar Kale and Others on 03.04.1975. Thereafter, Plaintiff sold 57R land from the said land to Defendant on 08.09.1977 by executing sale deed. Because of the said transaction, original survey no. 120 was renumbered as 120/1 and 120/2. It is further claimed that Defendant from the co-sharer has purchased other portion of the said property and since then properties are known as 120/2 as 120/2/A and 120/2/B. Plaintiff has claimed 1/9th share in the said property in common.

It is further averred in the plaint that after purchase of new survey no. 81/1 converted agricultural land into non-agriculture land and constructed Jagdamba Hospital therein. It is claimed that towards southern corner of the hospital there is shed and next to the said shed 3R land from common, owned by the Plaintiff is situated. It is alleged that without there being any right in respect of the said property, Defendant has obstructed act of the Plaintiff of digging foundation for the purpose of construction of the house, hence, suit came to be filed.

4. Defendant filed written statement at Exh. 16 wherein it is specifically claimed that Defendant is the owner of the land purchased from the Plaintiff and he has been handed over the possession thereof in terms of sale deed. It is denied that any land is situated towards western side of the land of the Defendant and his hospital. It is claimed that description of the property in sale deed executed between the parties clearly shows that the land belonging to the Plaintiff did not exist towards western side as there was road towards the said side.

5. Learned Trial Court framed issues at Exh. 29 and burden was cast on the Plaintiff to prove that he is owner and possession of the suit land and is entitled for injunction as asked for.

6. Plaintiff examined himself at Exh. 30. He relied upon various documents i.e., 7/12 extract and mutation entries including sale deed Exh. 41. Plaintiff also examined Namdeo Kale at Exh. 34 from whom Plaintiff has purchased land being known as erwad patti bearing survey no. 120/B in the year 1975. Similarly, Dattatraya Kale was examined at Exh. 35. Defendant did not enter witness box and no oral or documentary evidence was led.

7. Learned Trial Court by passing judgment and decree has held that Plaintiff is owner and in possession of the suit land, however, has failed to prove the obstruction being caused by Defendant and hence, ultimately suit was dismissed.

8. First Appellate Court in its judgment has concurred with findings recorded by the trial Court with regard to the ownership and possession of the

Plaintiff over the suit property/land and decreed the suit by granting injunction. It is specifically observed by the First Appellate Court that the findings recorded by the trial Court with regard to the ownership and possession of the Plaintiff over the suit property has not been taken exception to by the defendant by filing Appeal or cross-objection.

9. Learned Counsel for the Defendant submits that since the suit filed by the Plaintiff was dismissed there was no occasion/reason for the Defendant to challenge the findings recorded by the trial Court with regard to the ownership and possession of the Plaintiff over the suit land as no decree was passed to that effect. It is his submission that in this Appeal if the Defendant is able to show that the findings recorded by the both Courts below on this issue are perverse, then such findings can be interfered with. By referring to the pleadings of the parties and evidence led before the trial Court, it is contended that Plaintiff has admitted the transaction of sale between him and Defendant in respect of 57R land and also conceded to the fact that the Defendant after converting the said

agricultural land into non-agriculture has constructed the hospital thereon. He has drawn attention of this Court to the sale deed Exh. 41 which provides description of the property which was sold in favour of the Defendant. According to him, said document indicates that to the western side of the land sold to the defendant there is road and hence, question of existence of land of Plaintiff to that side does not arise. He further drew attention of the Court to the evidence of Plaintiff wherein he has admitted about Defendant being put in possession of the land purchased by him in accordance with sale deed. Thus, it is his submission that both Courts below have committed error in misreading/mis-construction of document and same amounts to substantial question of law and hence, Appeal deserves to be allowed by setting aside judgment and decree passed by the First Appellate Court. He placed reliance on judgment of this Court in case of *Temple of Maruti Vs Balkrisna Suryaji S. Kakodkar and Another, 1998(3) ALL MR 403.*

10. This Appeal came to be admitted on 24.02.1995 and the substantial question of law was formulated as

to the construction of the document with reference to the area sold.

11. At the outset, this Court is required to take into consideration the fact that the Defendant did not challenge the findings recorded by the trial Court with regard to the ownership and possession of the Plaintiff over the suit land by filing any cross-objection or Appeal. In this regard, it is pertinent to note that there was no decree passed by trial Court declaring the ownership of the Plaintiff over the suit land though finding was recorded and as such, there was no occasion for the Defendant to prefer any Appeal or cross-objection in order to challenge the same. However, it was open for Defendant to take exception to the findings recorded against him by Trial Court i.e., in the instant case finding about Plaintiff having succeeded to prove ownership and possession over suit land. Record does not indicate any such challenge is raised by Defendant before First Appellate Court. In this Second Appeal it is not open for Defendant to challenge the said findings recorded by the Courts below on facts but a limited challenge is permissible

if Defendant shows that the said findings arrived at by both Courts are contrary to material on record or wrong inferences are drawn from proved facts. Of course it is also open to challenge the misconstruction of document, if done by these Courts.

12. At this stage, it is apposite to refer to the judgment of Hon'ble Apex Court in case of **Nazir Mohamed Vs. J. Kamala and Others, (2020) 19 SCC 57**, wherein substantial question of law in the context of a document is dealt with and decided to state that:

33.1 An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law is construing a document, it gives rise to a question of law.

Thus, inference of fact drawn in respect of sale deed (Exh. 41) in the present case would be a question of fact. It is only in case of legal effect of term of said document that constitutes question of law.

13. Even existence of question of law is not sufficient to entertain second appeal as such question must be a substantial question of law. From various pronouncements of Supreme Court term substantial question of law is well established to say that

The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. Mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.

14. It is also trite that as a general rule High Court will not interfere with concurrent findings of Courts below except where material on record is

ignored, wrong inferences are drawn from proved facts. Keeping in mind above settled principles of law, contentions raised by Defendant are considered.

15. There is specific pleading in the plaint describing the suit property as 3R land towards the southern side of shed constructed thereof. The Plaintiff also filed map along with to indicate location thereof.

16. In the instant case, there are certain facts which are not in dispute such as Plaintiff is the owner and in possession of remaining land of Survey No. 120 along with other co-sharers. Defendant has purchased 57R land from Plaintiff. Evidence of the witnesses examined by Plaintiff shows that the land sold to the Defendant is a strip of land east to west. It is also confirmed that the possession of the land was assigned to the Defendant in accordance with the sale deed. In this regard, perusal of the sale deed Exh. 41 indicates that towards southern side of the land belonging to the Defendant there is part of old Survey No. 120. The said description of the land sold to the Defendant proves that towards southern side of the land belonging to the

Defendant land of Plaintiff exists. It is pertinent to note that the Defendant has specifically claimed ownership from the said part of the Survey No. 120 with description that 3R land is abutted to the shed constructed by Defendant towards southern side of its land. It is not the case wherein Defendant alleged any encroachment against Plaintiff on his land. Plaintiff on the basis of oral as well as documentary evidence has established that even after sale of the land admeasuring 57R to the Defendant certain portion of Survey No. 120 remained in his possession as owner thereof. Plaintiff, therefore, has discharged initial burden on him to prove the ownership and possession in respect of the suit land. Admittedly, Defendant has not entered in the witness box or has led any evidence in order to rebut the evidence led by the Plaintiff.

17. Coming to the submissions made on behalf of Defendant about misinterpretation of the document i.e. sale deed Exh. 41, it is pertinent to note that the said sale deed indicates about existence of portion of land from Survey No. 120 towards southern side of the land belonging to the Defendant. Thus, there is no

question of misinterpretation of document on the part of trial Court as well as First Appellate Court while arriving at the conclusion that Plaintiff has succeeded in proving his ownership and possession over the suit land. In view of the settled position of law with regard to the substantial question of law on the point of construction of the document, the interference drawn of the fact that from the sale deed could not be considered as substantial question of law. It is only in case of legal effect of the said terms of sale deed that would constitute a question of law. In this case on both counts this Court finds no error committed by Courts below in interpreting sale deed in the light of pleadings and evidence on record to reach to the conclusion about Plaintiff having succeeded to prove his case. The said concurrent finding of fact being not perverse and in ignorance or contrary to the material evidence on record, cannot be interfered with in this Appeal.

18. As far as grant of injunction against the Defendant is concerned, the fact that even in absence of any plea being raised by the Defendant about any

encroachment being sought to be done by the Plaintiff on his property, the suit is sought to be resisted. The said resistance by the Defendant itself indicates about there being substance in the contention of the Plaintiff in this regard. Apart from this, it is pertinent to note that Plaintiff has pleaded about the obstruction caused by the Defendant and in support of the same, evidence of witness is also led. The fact of obstruction caused by the Defendant is required to be proved by Plaintiff on preponderance of probability, which Plaintiff has succeeded in proving. In absence of any rebuttal on the part of the Defendant, learned trial Court was not justified in refusing the injunction sought by the Plaintiff. Learned First Appellate Court, therefore, has rightly corrected error committed by the Trial Court in rejecting the relief of injunction.

19. In view of above discussion, this Court find that there is no substantial question of law involved in this Appeal. Though Appeal was admitted by formulating substantial question of law with regard to the construction of the document, this Court find no

error committed by both Courts below in construction/interpretation of the same. Since no perversity is found with regard to recording reasons by both Courts below, the same does not require interference in this Appeal. In the result, Appeal stands dismissed. Pending applications are also disposed of.

(R. M. JOSHI, J.)

1. After pronouncement of judgment, learned Counsel for the Appellant seeks continuation of interim relief for the period of eight weeks.

2. None for other side.

3. In view of the fact that the interim relief is running since year 1995, same is extended as prayed for.

(R. M. JOSHI, J.)

Malani