



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 750 OF 2013

Tukaram Kashinathrao Kale
VERSUS
Pundlik Ramrao Narwade And Ors

...
Mr. S. S. Manale, Advocate for Appellant
...

CORAM : R.M. JOSHI, J
DATE : FEBRUARY 09, 2024

PER COURT :

1. Unsuccessful plaintiff ha preferred this Appeal under Section 100 of Code of Civil Procedure taking exception to the dismissal of RCS No. 96/2003 and confirmation of the said decree in RCA No. 137/2009.

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

3. Plaintiff filed suit in respect of block no. 81 admeasuring 4H 33R land. He claimed that out of the said land he has transferred 1H each to his son and mother and he is in possession of remaining 2H 33R land. The defendants are said to be owners of block no.

82 admeasuring 2H 64R which is situated on the western side of the land of plaintiff. It is alleged by plaintiff that in the year 1986 one of the adjacent owner of the land of the plaintiff has tried to encroach upon and started illegal proceedings before Consolidation Officer. Plaintiff filed RCS No. 463/1986 wherein he is declared as owner of 4H 33R land from block no. 81. There is further allegation that by demolition common bandh defendants are trying to encroach upon his land and therefore, he has sought perpetual injunction against them.

4. Defendant appeared in the suit and opposed the same. It is their contention in written statement that they are the owners of 8A 8 Guntha land from Block No. 82, however, in the consolidation report the area is shown is less i.e., 6 acres 34 gunthas. It is alleged that Plaintiff with an intention to grab the land of the defendants suit came to be filed.

5. Learned trial Court framed the issues at Exh. 42. Parties led evidence. Trial Court by passing judgment dated 10.08.2009 dismissed the suit. The said decree was unsuccessfully challenged in RCA No.

137/2009.

6. Learned Counsel for the Appellant/Original Plaintiff submits that the First Appellate Court as well as Trial Court have committed error in not considering the case of the Plaintiff in proper perspective. It is his submission that a specific plea is raised to the challenge as recorded by the First Appellate Court in paragraph 19 of the judgment. It is his submission that Plaintiff had filed suit bearing RCS No. 64/2006 for declaration and possession against Defendants of the suit property which is decreed on 29.09.2008. He contends that the said decree has not been challenged by the Defendants as such, the said proceeding has attained finality. He drew attention of the Court to Section 11 of Code of Civil Procedure and in particular explanation 1 to argue that judgment in RCS No. 64/2006 has attained finality and as such, in view of pendency of present Appeal judgment in RCS No. 96/2003 is yet to attain finality, it amounts to res judicata in present suit. He further argued that trial Court has committed error in not framing issue with regard to the ownership of Plaintiff over the suit

land. Thus, according to him, substantial question of law arises in the present Appeal.

7. Perusal of the pleadings before trial Court indicates that the Plaintiff has come out with a case of title as well as possession in respect of suit property and has sought injunction against defendant from interference therein. Defendants, on the other hand, has challenged the ownership as well as possession. Learned trial Court had frame issues. Plaintiff never objected to the same and in fact, led evidence. Even no plea was raised before First Appellate Court taking exception to the framing of issues by trial Court.

8. Having regard to the fact that the issue involved before the trial Court was in respect of possession of the suit property, as such, the said issue is framed and tried before trial Court. Hence, this Court finds no substance in the objection to framing of issues. First Appellate Court has observed in its judgment that in the instant case the measurements carried out by the cadestral surveyor is not believable and that he himself admitted in its

cross-examination about not carrying out measurement properly. Learned Counsel for Plaintiff was unable to show any material evidence on record to indicate that the said findings are perverse and not in consonance with the evidence on record. It is further observed by the First Appellate Court that the record indicates that the Plaintiff is taking advantage of the excess area shows in his name in the consolidation scheme and matter pertaining to it is still pending. This finding is also not contrary to the material placed on record.

9. As far as issue of res judicata sought to be raised by learned counsel for plaintiff is concerned, though explanation 1 to Section 11 of CPC states that the expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto. Even if this argument is accepted, the question arises as to whether any such plea was raised and whether pleadings in RCS No. 64/2006 were placed before the trial Court in order to decide the said issue. Admittedly no such plea is raised nor pleadings in another suit are part of record. The issue sought to be raised is not a pure

question of law to be permitted to be raised at any stage of proceeding. Having regard to pleadings and evidence on record and judgments impugned, this Court finds no substantial question of law being involved in this Appeal. Existence of substantial question of law is sine qua non for entertainment of an appeal under Section 100 of CPC. Hence, appeal stands dismissed.

(R. M. JOSHI, J.)

Malani