HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.71 OF 2006
ALONGWITH
CIVIL APPLICATION NO. 576 OF 2016

Sitaram Moreshwar Sutar @ Shiposkar ….. Appellant

VERSUS

Shantaram Moreshwar Sutar,
Since deceased through his legal representatives ….. Respondents

Mr.R.V.Govilkar, i/b. Ms.Smita Mhatre for the Appellant.

None for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 22nd SEPTEMBER, 2016

P.C.

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original plaintiff) has impugned the order and judgment dated 29th October, 2005 passed by the learned Joint District Judge, Ratnagiri allowing the Civil Appeal No. 63 of 2002 filed by the respondent (original plaintiff). None appeared for the respondent when the matter was called out. The parties described in this order are described as per their status in the proceedings before the learned trial judge. The appellant was the original defendant whereas the respondent was the original plaintiff.

2. It is the case of the plaintiff that the plaintiff and the defendant are real brothers and are residents of Village Shiposhi. The suit properties were originally owned by one Khot by name Athalye. The plaintiff was the tenant of Mr.Athalye. It is the case of the plaintiff that he had planted 100 cashew nut trees in land Gat

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No.1212 before 4 years. The plaintiff had constructed compound wall around suit properties and were incurring expenditure.

3. In the year 1978, during the course of consolidation scheme, the suit properties were transferred in name of the plaintiff. The authorities under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act,1947 (for short the said Fragmentation Act) issued certificate under section 24(1) of the Fragmentation Act. The plaintiff became exclusive owner of the suit properties.

4. It is the case of the plaintiff that since the defendant was illegally interfering with the possession of the plaintiff, the plaintiff filed a civil suit (99 of 1997) against the defendant inter alia praying for perpetual injunction against the defendant. The writ of summons were served upon the defendant. The defendant filed written statement and denied the claims of the plaintiff. It was averred in the written statement that the suit properties were entered in the name of the father of the plaintiff by name Moreshwar Bhiku Sutar as tenant. The father of the plaintiff and defendant died in the year 1962. The name of the plaintiff, defendant and their brothers and other 10 persons were recorded in the revenue record as heirs of deceased father of the plaintiff and the defendant. It was averred that the suit was bad for non-joinder of necessary parties.

5. The learned trial judge framed five issues. The plaintiff led oral evidence before the learned trial judge and also produced documentary evidence. The defendant however did not lead any oral or documentary evidence before the learned trial judge.

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6. By a judgment and decree dated 24th April, 2002, the learned trial judge granted perpetual injunction against the defendant, his servants, relatives, agents thereby perpetually restraining from causing illegal interference in peaceful possession of the plaintiff in the suit properties at Sr.Nos. 1 to 17 mentioned in the schedule. Being aggrieved by the said judgment and decree dated 24th April, 2002 the defendant preferred an appeal (63 of 2002) in the Court of Joint District Judge, Ratnagiri. The learned District Judge by the impugned judgment and decree dated 29th October, 2005 allowed the said Civil Appeal No.63 of 2002 filed by the defendant and dismissed the suit for perpetual injunction filed by the plaintiff.

7. Being aggrieved by the said judgment and decree dated 29th October, 2005, the plaintiff has filed this second appeal under section 100 of the Code of Civil Procedure, 1908.

8. This court by an order dated 24th March, 2006 admitted the second appeal on the following substantial questions of law :-

(i) Whether the Appellate Court completely lost sight of the fact that admittedly the certificate under section 24 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act,1947 was issued in the name of the Appellant-Plaintiff and therefore the certificate being a document of title, the Appellant-Plaintiff became exclusive owner of the property subject matter of the certificate ?

(ii) Whether the Civil Court has jurisdiction to hold that though the certificate under section 24 of the said Act of 1947 was issued exclusively in the name of the Appellant-Plaintiff, even the other members of the family have right, title or

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interest in respect of the property covered by the said certificate ?

9. Mr.Govilkar, learned counsel for the plaintiff invited my attention to the averments made in the plaint and the written statement and also the findings recorded by the learned trial judge. He submits that there was no dispute that the Consolidation Officer had issued a certificate on 4th May, 1978 under section 24 of the Fragmentation Act thereby declaring the plaintiff as the owner of the suit properties. He submits that the plaintiff had also produced several documents before the learned trial judge by leading evidence showing exclusive possession of the plaintiff in respect of the suit properties. He submits that after considering the oral and documentary evidence and after considering the effect of the certificate issued under section 24 of the Fragmentation Act, the learned trial judge rightly held that the plaintiff had proved that he had become the owner of the suit properties by virtue of certificate dated 4th May, 1978 and had also proved that he was in exclusive possession of the suit land. Insofar the issue as to whether suit was bad for non-joinder of necessary parties is concerned, the said issue is answered in negative by the learned trial judge.

10. Learned counsel for the plaintiff also invited my attention to the issues framed by the first appellate court in paragraph (14) of the impugned order and judgment and would submit that though the issue of ownership was raised by the defendant in the written statement and the finding was rendered by the learned judge on the issue of ownership in respect of the suit property in view of the certificate issued under section 24 of the Fragmentation Act, the first appellate court has not framed any issues in respect of the ownership. He submits that though no oral evidence was led by the defendant to prove the averments made in

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the written statement on the issue of ownership and the possession, the first appellate court has rendered the finding of possession based on by drawing an inference on the ground that since the father of the plaintiff and defendant was a tenant, all the family members must have been in possession of the suit property. He submits that the entire order and judgment rendered by the first appellate court is perverse and is contrary to the oral and documentary evidence on record. He submits that the order and judgment rendered by the first appellate court is also contrary to section 24 of the Fragmentation Act.

11. A perusal of the plaint and the written statement filed by the plaintiff and the defendant respectively indicates that the plaintiff claimed to be the owner of the suit property by virtue of certificate issued under section 24 of the Fragmentation Act. The ownership of the plaintiff was disputed by the defendant in the written statement. The defendant claimed to be in joint possession of the suit property.

12. It is not in dispute that the plaintiff had entered the witness box and had produced various documents in support of his averments that he was in exclusive possession of the suit property and had become the owner by virtue of certificate issued by the authority under section 24 of the Fragmentation Act.

13. A perusal of the findings recorded by the learned trial judge indicates that the learned trial judge has not only considered the transfer certificate under section 24(1) issued by the authority under Fragmentation Act but has also considered various documents produced by the plaintiff showing his exclusive possession of the suit property and has rendered a finding that the plaintiff was the owner and was in possession of the suit property. The learned trial judge has rightly considered the entire evidence led by the plaintiff while rendering the finding of

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ownership and possession of the plaintiff in respect of the suit property.

14. Though the defendant had filed a written statement before the learned trial court, admittedly did not enter the witness box. The averments made in the written statement thus cannot be held to be proved.

15. A perusal of the record indicates that though the issue of ownership was an issue before the learned trial judge, the first appellate court did not frame any issue regarding ownership of the suit property based on the transfer certificate issued by the authority under section 24 of the Fragmentation Act.

16. A perusal of the order and judgment rendered by the first appellate court indicates that the learned trial judge has rendered a finding of possession in favour of the defendant by drawing an adverse inference that the tenancy being in the name of the father, all the family members must have been in joint possession of the suit property though no oral evidence was led by the defendant to prove the exclusive possession of the defendant or joint possession of the defendant with the plaintiff. In my view the first appellate court has rendered a finding of possession based on no evidence. In my view the first appellate court could not have rendered any such finding of possession though no oral evidence was led by the defendant. The first appellate court has not considered the documents proved by the plaintiff in support of his exclusive possession of the suit land.

17. In my view the impugned order passed by the learned District Judge allowing the appeal filed by the defendant shows perversity. The impugned order is also contrary to and in violation of section 24 of the Fragmentation Act.

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Section 24 of the Fragmentation Act reads thus :-

> (1) The Consolidation Officer shall grant to every owner to whom a holding has been allotted in pursuance of a scheme of consolidation and to every person to whom a right is allotted under '[sub-section (6)] of section 21, a certificate in the prescribed form duly registered under the Indian Registration Act, 1908, to the effect that the holding has been transferred to him in pursuance of the scheme.
>
> 2[The Consolidation Officer may, thereupon, cause to be prepared a new record of rights in respect of the holdings so transferred and the record of rights so prepared shall be deemed to have been prepared in the Hyderabad area of the State under the Hyderabad Record of Rights in Land Regulation, 1358, Fasli, and elsewhere under the relevant Code.]
>
> (2) Notwithstanding anything contained in any law for the time being in force no stamp or registration fee shall be payable in respect of such certificate.

18. A perusal of the section 24 of the Fragmentation Act clearly indicates that the Consolidation Officer is under obligation to grant a certificate in the prescribed form to the holder who has been allotted in pursuance of the scheme of consolidation and to any person to whom right is alloted under section 21(6) of the Act. On the basis of such certificate, a new record of rights in respect of the holdings so transferred and the record of rights so prepared shall be deemed to have been prepared. It is thus clear that in view of issuing such certificate under section 24 of the Fragmentation Act, the plaintiff had become exclusive owner in respect of the suit property. In my view the impugned order passed by the first appellate court is overlooking and contrary to the section 24 of the Fragmentation Act and thus deserves to be set aside.

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19. In my view, the appellate court had completely lost sight of the fact that the certificate under section 24 of the Fragmentation Act was issued in the name of the plaintiff by the consolidation officer. The substantial question of law (i) is answered in affirmative accordingly. In view of the bar under section 36 A of the Fragmentation Act, in my view the first appellate court could not have exercised any jurisdiction to hold that the certificate issued under section 24 of the Fragmentation Act was issued exclusively in the name of the plaintiff and even the other members of the family had right, title and interest in the suit property and were covered by the said certificate. The substantial question of law (ii) is accordingly answered in negative.

20. I, therefore, pass the following order :-

(a) The impugned order and judgment dated 29th October, 2005 passed by the learned Joint District Judge, Ratnagiri in Civil Appeal No. 63 of 2002 is set aside. Civil Appeal No. 63 of 2002 filed by the defendant is dismissed.

(b) The judgment and order dated 24th April, 2002 passed by the learned Civil Judge, Junior Division is upheld.

(c) Second appeal is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]

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