

A

RAMCHANDRA SAKHARAM MAHAJAN
v
DAMODAR TRIMBAK TANKSALE (D) AND ORS.

JULY 9, 2007

B

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Transfer of Property Act, 1882:

C

Suit for possession—Based on title—Burden of proof—Held: Is on plaintiff to establish that title—Weakness in defence or failure of defendants to establish title set up by them, would not enable plaintiff to a decree.

Title is not decided by survey records alone.

D

Code of Civil Procedure, 1908—o.6. r.17

Amendment of plaint—Plaintiff wanted to amend the plaint and supply better particulars—Trial Court ought to have allowed amendment so as to decide dispute in more satisfactory manner.

E

Evidence Act, 1872:

Ancient document—Lease deed of year 1875—Plaintiff produced certified copy of lease deed—Trial Court refused to look into the document of title on the ground that no foundation laid for adducing secondary evidence—Held: Not proper.

F

The plaintiff-appellant filed a suit for declaration of joint title with defendant No.10 to 13 and for recovery of possession of suit property against defendants no. 1 to 9. The case of plaintiff was that suit property belonged to a Muslim family and was granted on lease to the predecessor-in-interest of the plaintiff and lease deed was executed in that behalf on 21.7.1875; that the predecessors of the plaintiff had permitted the predecessors of defendants 1 to 9 to occupy a portion of the leasehold property on licence. While in such occupation, defendants 1 to 9 had demolished a structure and were attempting to raise a commercial construction therein; that Defendants 1 to 9 were not

H

entitled to do so and hence the plaintiff was entitled to recover possession on the strength of his title. Defendants 1 to 9 denied the claim of the plaintiff and set up title in themselves. A

The plaintiff amended the plaint once. He sought to amend the plaint again to pinpoint the disputed property with better particulars. But the trial Court dismissed the application for amendment. B

In support of his case, the plaintiff produced a number of revenue records and other documents. He did not produce the lease deed dated 21.7.1875. Belatedly, he tried to introduce a certified copy of the lease deed in evidence. The trial Court took the view that no foundation had been laid for adducing secondary evidence since what was sought to be produced was only a certified copy and not the original and hence discarded the lease deed. Taking the view that the other documents relied upon by the plaintiff were not enough to establish the title of the plaintiff, the trial Court dismissed the suit. Defendants 1 to 9 had made a counter claim for relief against the plaintiff in respect of a portion of the property and the trial Court found that the counter claim had not been established. Thus the trial Court dismissed the suit as well as the counter claim. C D

In appeal, plaintiff questioned the refusal to permit him to amend the plaint and supply better particulars and also refusal of the trial Court to admit the certified copy of the lease deed dated 21.7.1985 in evidence. Defendants 1 to 9, though they filed a memorandum of cross objections questioning the dismissal of their counter claim filed before the trial Court, did not press it and gave up their counter claim. Appellate Court dismissed the appeal. Hence the present appeal. E

Allowing the appeal and remanding the matter to the trial Court for fresh trial, the Court F

HELD: 1. The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. [Para 10] [186-B] G

2.1. The plaintiff had established his title to the suit property. The plaintiff, though somewhat belatedly, attempted to amend the plaint to make H

A his claim more precise so as to enable the Court to adjudicate upon it more satisfactorily. The trial Court ought to have allowed the amendment so as to enable it to decide the dispute in a more satisfactory manner. The appellate Court was also not justified in harping upon the so-called absence of *bona fides* on the part of the plaintiff in approaching the Court. What was called for, was an independent appraisal of the various documents produced by the plaintiff in the light of the pleadings and the oral evidence available, to come to a conclusion whether the plaintiff had established his title or not. In that context, the appellate Court ought to have seen that the trial Court was in error in refusing the amendment of the plaint which would have enabled the Court to render a decision in a more satisfactory manner.

C [Para 11] [186-C, D, E]

D 2.2. Similarly, when there is an ancient document of 1875 that is being relied upon in support of the claim of the plaintiff, the appellate Court ought to have granted an opportunity to the plaintiff to prove that document or to lay the foundation for adducing secondary evidence for its acceptance in evidence by production of a certified copy of the lease deed. By refusing to look into the document of title relied upon by the plaintiff on the ground that no foundation has been laid for adducing secondary evidence by production of a certified copy of the lease deed, the trial Court and the appellate Court have adopted a course that has resulted in injustice to the parties. After all, the whole case depends upon whether the suit property is included in the 1875 lease deed and if it is included, whether the plaintiff could get a decree for recovery of possession of the portion in the possession of defendants 1 to 9.

E [Para 12] [186-F, G; 187-A]

F 3. The appellate Court, has erred in placing undue reliance on what is called the City Survey records when the other Survey records, the revenue map, the record of rights and other documents relied upon by the plaintiff tended to show that suit property was held by the family of the plaintiff under a lease from a Mohammedan family as granted by two ladies of that family. If the property is included in the 1875 lease deed, then the further question is whether the plaintiff is entitled to recover possession thereof on the strength of his title claimed jointly with defendants 10 to 13. Title is not decided by survey records alone. If necessary, a proper identification of the property leased out to the family of the plaintiff under the 1875 lease deed has also to be made by issuing a Commission for that purpose. The amendment is allowed as sought for by the plaintiff at a belated stage.

H [Para 13 and 14] [187-B-C, F]

4. It would be in the interests of justice, to give the plaintiff an opportunity to produce the original lease deed of the year 1875 or to adduce evidence in support of his claim to get marked in evidence a certified copy of the lease deed as secondary evidence. Such an opportunity will also be granted by the trial Court to the plaintiff. Similarly the plaintiff will also be given an opportunity to get the property comprised in the lease deed of 1875 identified and to get demarcated the disputed portion in the entire property by issuing an appropriate commission for that purpose. However, since the plaintiff had not been diligent in prosecuting the suit in a proper manner, he is directed to deposit in the trial Court as costs a sum of Rs.15,000/-.

[Para 15 and 16] [187-G; 188-A, B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2920 of 2007.

From the Judgment and final Order dated 23.3.2005 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in F.A. No. 515/1997.

WITH

S.L.P. (C) No. 5753 of 2006.

U.U. Lalit, Sr. Adv., A.S. Kulkarni, Aniruddha P. Mayee, Sanjeev Kumar Choudhary, Sanjay Visen and Amit Yadav for the Appellant.

V.A. Mohta, Sr. Adv., Manish Pitale, Chander Shekhar Ashri and Sunil Kumar Verma for the Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. Leave granted.

1. This appeal arises out of Special Leave Petition (Civil) No.9739 of 2005. The plaintiff in a suit for declaration of joint title with defendant nos.10 to 13, for recovery of possession of the plaint schedule property and for mandatory and prohibitory injunctions, is the appellant in this appeal. He filed Civil Suit No.53 of 1990 against the defendants 1 to 9. On objection being raised by defendant 1 to 9, the plaintiff also impleaded defendants 10 to 13 who he claimed were co-owners with him of the suit property.

2. According to the plaintiff, the suit property was blocked in new khasra no.327 and recovery of possession was sought in respect of 73 cents in the north-western corner of the said khasra. The case of the plaintiff is that

A new khasra no.327 along with khasra nos. 329, 330 and 331 out of Mouza Sitabuldi, Circle No.19/27, Division No.8 at District Nagpur belonged to a Muslim family and the property was granted on lease to Balwantrao Mahajan, a predecessor-in-interest of the plaintiff. The lease deed executed in that behalf was dated 21.7.1875. The predecessors of the plaintiff had permitted the predecessors of defendants 1 to 9 to occupy a portion of the leasehold property on licence. While in such occupation, defendants 1 to 9 had demolished the structure that had been originally put up for residence in the property and were attempting to raise a commercial construction therein and to exploit the property commercially. Defendants 1 to 9 were not entitled to do so and the plaintiff was entitled to recover possession on the strength of his title. The plaintiff had pleaded that there had been a partition between him and defendants 10 to 13, but the subject matter of the suit was not divided and consequently it continued under the joint title of the plaintiff and defendants 10 to 13. Defendants 10 to 13 did not support the case of the plaintiff. For reasons of their own they purported to disown any title in the suit property. According to the plaintiff, they had been got at by defendants 1 to 9.

3. Defendants 1 to 9 denied the claim of the plaintiff and set up title in themselves. The licence pleaded by the plaintiff was denied. The right of the plaintiff to recover possession was questioned. It was contended that defendants 1 to 9 were in possession of the property and their family had long been in possession thereof in their own right and the plaintiff was not entitled to any relief.

4. It may be noticed that the plaintiff had amended the plaint once. He sought to amend the plaint again for what his counsel called, trying to pinpoint the disputed property with better particulars. But the trial Court dismissed the application for amendment.

5. In support of his case, the plaintiff produced a number of revenue records and other documents. For reasons not explained, he did not produce the lease deed dated 21.7.1875, the source of the title of his family as set up in the plaint. Belatedly, he tried to introduce a certified copy of the lease deed in evidence. The trial Court took the view that no foundation had been laid for adducing secondary evidence since what was sought to be produced was only a certified copy and not the original and hence discarded the lease deed. Taking the view that the other documents relied upon by the plaintiff including Ext.141 and 142 and the khasra entries for the succeeding years are not

enough to establish the title of the plaintiff, the trial Court dismissed the suit. Incidentally, the trial Court also appeared to find that defendants 1 to 9 had not established the title claimed by them. But the trial Court rightly took the view that the burden was on the plaintiff to establish his title and any weakness in the defense would not entitle the plaintiff to a decree for recovery of possession. It may be noticed that defendants 1 to 9 had made a counter claim for relief against the plaintiff in respect of a portion of the property and the trial Court found that the counter claim had not been established. Thus the trial Court dismissed the suit as well as the counter claim.

6. The plaintiff filed an appeal. In the appeal, he questioned the refusal to permit him to amend the plaint and supply better particulars which according to him were needed for a proper adjudication of the matters in controversy. He also challenged the refusal of the trial Court to admit the certified copy of the lease deed dated 21.7.1875 in evidence. He raised the contention that the documents produced on behalf of the plaintiff and the admission of defendants 1 to 9 of the title of the predecessor of the plaintiff over khasra no.327 and the plea raised that the property in the occupation of defendants 1 to 9 was outside the property of the predecessor of the plaintiff and did not form part of khasra no.327/1 established the title of the plaintiff. He contended that on the materials available, the trial Court ought to have decreed the suit and the dismissal of the same was clearly erroneous. Alternatively, it was pressed that the trial Court ought to have permitted the amendment of the plaint and also ought to have admitted the certified copy of the lease deed in evidence and that not having been done and the trial Court having discharged two of the witnesses that the plaintiff had cited and produced for examination, there had been miscarriage of justice and the plaintiff was entitled to have a proper opportunity to establish his case. On behalf of defendants 1 to 9 it was pleaded that there was no *bonafides* in the suit, and the stand of defendants 10 to 13 disowning any joint right, title or interest in the property with the plaintiff was relied upon. It was submitted that the trial Court was justified in not permitting the amendment of the plaint sought for at a belated stage and in not admitting in evidence the certified copy of the lease deed dated 21.7.1875 and that the suit filed by the plaintiff was a speculative one and that there was no occasion for the appellate Court to show any indulgence to the plaintiff. On merits, it was contended that the trial Court was right in holding that the plaintiff has failed to prove the title of his family over the property in the possession of defendants 1 to 9 and that the suit had been rightly dismissed. But, defendants 1 to 9, though they filed a memorandum of cross-objections questioning the dismissal of their

A counter claim filed before the trial Court, did not press it and gave up their counter claim.

7. The appellate Court proceeded essentially to refer to some City Survey records and the recording therein of defendants 1 to 9 or their predecessor as occupants and the alleged belated objection to the same raised by the plaintiff. The appellate Court brushed aside the various revenue records relied upon by the plaintiff in support of this case and the entries in record of rights that the predecessor of the plaintiff was in possession as a lessee under the Muslim ladies who had Malik Makbuja rights in the property and the recording in 1914-15 of the property being held by his family in terms of the indenture of lease of the year 1875. The appellate Court also did not properly advert to the relevant entries in the revenue records relating to different plots and taking the overall view that the plaintiff's approach to the Court lacked *bona fides*, dismissed the appeal. Feeling aggrieved by this dismissal, this appeal has been filed by the plaintiff.

8. Learned Senior Counsel for the plaintiff-appellant, took us elaborately through the pleadings and the evidence in the case. At the threshold, he submitted that the amendment of the plaint though asked for belatedly, should have been allowed since allowing of that amendment would have pinpointed the dispute between the parties that called for resolution in the suit and that the appellate Court was in error in observing that there was no *bona fides* in the suit. He contended that adequate foundation had been laid for accepting the copy of the lease deed of the year 1875 in evidence by receiving the certified copy thereof produced by the plaintiff and discarding the lease deed from consideration has resulted in clear miscarriage of justice. Learned counsel also pointed out that the trial Court was in error in not recording the evidence of the two witnesses from the Survey Department made available by the plaintiff for examination in support of his case and thereby the plaintiff has been denied justice in the lis. Learned counsel pointed out that the records clearly show that the property was held by a Mohammedan family and two ladies thereof had granted a lease in favour of the predecessors of the plaintiff in the year 1875 and thereafter the revenue records consistently show that the predecessors of the plaintiff had been in possession under the Mohammedan ladies on the basis of the lease deed and in that context, the explanation offered by the plaintiff that the predecessors of defendants 1 to 9 were permitted to occupy a portion which was only in the form of a licence, was fully acceptable especially in the context of the stand adopted in defense that the property was not included in khasra no.327/1 and the failure of

defendants 1 to 9 to establish the title set up by them. Learned counsel submitted that there was no sanctity to the so-called City Survey records for deciding the dispute on title, especially in the context of the Survey records produced on the side of the plaintiff and in that context, the courts below, were clearly in error in not permitting the witnesses to be examined to establish the case of the plaintiff. Learned counsel submitted that on the materials, the plaintiff was entitled to succeed in the absence of defendants showing any right in themselves and the plaintiff having established that the suit property is part of khasra no.327/1 which was included in the lease deed of the year 1875 in favour of the family of the plaintiff. Alternately, counsel submitted that the matter required to be remanded to the trial Court for a fresh trial, giving the plaintiff an opportunity to lead evidence in support of the admissibility of the certified copy of the lease deed or for production of the lease deed if it is available and if necessary for taking out a commission for a proper identification of the property comprised in the lease deed dated 21.7.1875 in favour of the family of the plaintiff which had not been terminated by the Mohammedan family. He also submitted that defendants 10 to 13 had obviously been purchased by defendants 1 to 9 and their failure to support the case of the plaintiff had no relevance and that cannot be relied upon to non-suit the plaintiff when the plaintiff has otherwise established his case. He submitted that the stand of defendants 10 to 13, was dishonest, to say the least.

9. Learned counsel for defendants 1 to 9 contended that the findings by the courts below that the plaintiff had failed to prove the title set up by him is a finding that does not call for interference in this appeal. It was a finding based on an appreciation of the materials produced in the case and there was no justification in interfering with the appreciation of the evidence by the courts below. Learned counsel further submitted that the admissions of the plaintiff in his oral evidence and the non-inclusion of the suit property in the partition between the plaintiff and defendants 10 to 13 and the admission in that behalf by the plaintiff in his evidence, all show that the suit has been filed as a speculative one and that the approach of the plaintiff to the Court was not *bona fide*. Learned counsel submitted that instead of furnishing all the relevant particulars even in the first instance and by not impleading defendants 10 to 13 either as co-plaintiffs or as defendants, the plaintiff had attempted to mislead the court and the appellate Court was fully justified in not countenancing the attempt of the plaintiff to amend the plaint once more and also in attempting to get the certified copy of the lease deed marked in evidence. It was submitted that the appeal deserves to be dismissed. It was also pointed out that the High Court had not only awarded a cost of

A Rs.25,000/-, but had also given an opportunity to the defendants to file a suit for damages if they were so advised, and this was because of the lack of *bona fides* on the part of the plaintiff in approaching the Court with the present suit. Learned counsel, therefore, submitted that the appeal deserves to be dismissed.

B 10. The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions.

C 11. The question, therefore, is whether the plaintiff had established his title to the suit property. The plaintiff, though somewhat belatedly, attempted to amend the plaint to make his claim more precise so as to enable the Court to adjudicate upon it more satisfactorily. We see force in the contention of learned senior counsel for the appellant that the trial Court ought to have allowed the amendment so as to enable it to decide the dispute in a more satisfactory manner. The appellate Court, it appears to us, was also not justified in harping upon the so-called absence of *bona fides* on the part of the plaintiff in approaching the Court. What was called for, was an independent appraisal of the various documents produced by the plaintiff in the light of the pleadings and the oral evidence available, to come to a conclusion whether the plaintiff had established his title or not. In that context, the appellate Court ought to have seen that the trial Court was in error in refusing the amendment of the plaint which would have enabled the Court to render a decision in a more satisfactory manner.

F 12. Similarly, when there is an ancient document of 1875 that is being relied upon in support of the claim of the plaintiff, the appellate Court ought to have granted an opportunity to the plaintiff to prove that document or to lay the foundation for adducing secondary evidence for its acceptance in evidence by production of a certified copy of the lease deed. By refusing to look into the document of title relied upon by the plaintiff on the ground that no foundation has been laid for adducing secondary evidence by production of a certified copy of the lease deed, the trial Court and the appellate Court have adopted a course that has resulted in injustice to the parties. The trial Court ought to have, in the circumstances, called for evidence regarding the availability of the original of the 1875 lease deed and given the plaintiff an

H

opportunity to lay the foundation for accepting in evidence a certified copy of that document. After all, the whole case depends upon whether the property is included in the 1875 lease deed and if it is included, whether the plaintiff could get a decree for recovery of possession of the portion in the possession of defendants 1 to 9.

13. Similarly, the appellate Court, it appears to us, has erred in placing undue reliance on what is called the City Survey records when the other Survey records, the revenue map, the record of rights and other documents relied upon by the plaintiff tended to show that khasra no.327/1 was held by the family of the plaintiff under a lease from a Mohammedan family as granted by two ladies of that family. If the property is included in the 1875 lease deed, then the further question is whether the plaintiff is entitled to recover possession thereof on the strength of his title claimed jointly with defendants 10 to 13. Title is not decided by survey records alone. If necessary, a proper identification of the property leased out to the family of the plaintiff under the 1875 lease deed has also to be made by issuing a Commission for that purpose. On a consideration of the rival arguments, we are satisfied that the matter requires to be decided afresh.

14. We find that the trial Court and the appellate Court were not justified in refusing the amendment of the plaint sought for by the plaintiff. No doubt there had been delay in seeking amendment but that delay could have been compensated by awarding costs to the contesting defendants 1 to 9. Therefore, we are satisfied that the amendment sought for by the plaintiff ought to have been allowed. We are inclined to allow the amendment sought for, since it would enable the Court to pin-pointedly consider the real dispute between the parties and would enable it to render a decision more satisfactorily to its conscience. We, therefore, allow the amendment as sought for by the plaintiff at a belated stage. The amendment will be carried out by the plaintiff in the trial Court within three months from this date as per the practice followed in the trial Court. Obviously defendants 1 to 9 would have an opportunity to file an additional written statement to the amended plaint. They will be entitled to file an additional written statement within a period of four months from the date of this judgment.

15. Similarly, we also think that it would be in the interests of justice, to give the plaintiff an opportunity to produce the original lease deed of the year 1875 or to adduce evidence in support of his claim to get marked in evidence a certified copy of the lease deed as secondary evidence. Such an

A opportunity will also be granted by the trial Court to the plaintiff. Similarly the plaintiff will also be given an opportunity to get the property comprised in the lease deed of 1875 identified and to get demarcated the disputed portion in the entire property by issuing an appropriate commission for that purpose. Thus on the whole we are satisfied that the matter requires to be remanded to the trial Court for a fresh trial and disposal.

B

16. But we cannot ignore the fact that the plaintiff had not been diligent in prosecuting the suit in a proper manner. We, therefore, think that he should be put on terms. We, therefore, direct the plaintiff to deposit in the trial Court as costs thrown away, a sum of Rs.15,000/- within a period of two months from this date. If such an amount is deposited, the same would be disbursed unconditionally to defendants 1 to 9.

C

17. In the result this appeal is allowed, the judgments and decrees of the courts below are set aside and the suit is remanded to the trial Court for a fresh trial and disposal in accordance with law and in the light of the observations made above. Since defendants 1 to 9 have not pursued their counter claim covered by their cross-objections in the High Court, the rejection of their counter claim would stand confirmed and it would not be necessary for the trial Court to consider the counter claim afresh. The parties are directed to suffer their respective costs in this Court. The parties will appear before the trial Court to receive further orders as to posting on 10.9.2007.

D

E

Special Leave Petition (Civil) No. 5753 of 2006

F **P.K. BALASUBRAMANYAN, J.** We See no reason to entertain this petition for special leave to appeal, especially in view of the judgment we have rendered today in Civil Appeal No. 2920 of 2007 (arising out of Special Leave Petition (C) No. 9739 of 2005). The suit will be tried and disposed of afresh in the light of the directions contained therein.

The petition is dismissed.

D.G.

Appeal allowed and Special Leave
Petition dismissed.