HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 485 OF 2018

Appellant (Orig. Defendant)	Ghanshaymdas Chinkumal Saheswani Age: 64 years, Occu: Retired, R/o: Block C-1 – Tenement – 3, Old Sindhi Colony, Taloda Road, Nandurbar.
	Versus
Respondent (Orig. Plaintiff)	Hiralal Ramchandra Saheswani Age: 60 years, Occu: Business R/o. Korit Naka, Nandurbar, Taluka & Dist. Nandurbar

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Mr. Subodh P. Shah, Advocate for the Appellant
Mr. Ruchir S. Wani, Advocate for the Respondent/Sole

CORAM : AVINASH G. GHAROTE, J.

JUDGMENT RESERVED ON : 19/06/2021
JUDGMENT PRONOUNCED ON : 09/07/2021

JUDGMENT : (AVINASH G. GHAROTE, J.)

1. Heard learned counsel for the parties. The entire paper book alongwith the exhibited documents has been placed on record and therefore, there is no need to call for the record and proceedings. The parties are referred to in the nomenclature, in which, they stood in the Trial Court.

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HIGH COURT OF JUDICATURE AT BOMBAY

2. In my considered opinion, the following substantial question of law arises for consideration:

(a) What are the parameters for invoking the provisions of 0.41 Rule 27 of the Civil Procedure Code and its applicability.

3. To consider the above question, it is necessary to state certain facts, which are as under:

(i) The suit property, is a tenement Bearing No. C-1-3, which was allotted to one Chinkumal, father of the defendant/appellant, in the year 1950, by the Government on lease.

(ii) Chinkumal died in 1963 and legal heirs of Chinkumal i.e. defendant claims to have come in possession.

(iii) On 17.04.1964, the tenement was sold in auction to one Narayandas, however, defendant claims to have continued in possession.

(iv) On 05.12.1966, Narayandas is claimed to have executed a sale deed of the above tenement in favour of Hiralal, however, defendant still claims to have continued in possession.

(v) Certain improvements, to the property are claimed to have been made by defendant whose name is shown as mutated in the Municipal record since 1962-1963.

(vi) Special Civil Suit No.19/2007 for possession based upon title, was filed by Hiralal/plaintiff, against the defendant, which came to

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HIGH COURT OF JUDICATURE AT BOMBAY

be partly decreed by the Trial Court whereby the defendant was directed to deliver vacant possession of the suit property alongwith the additional construction carried by the defendant to the plaintiff within one month of the judgment. The claim for compensation and mesne profit was dismissed. The plea of having acquired title by way of adverse possession by the defendant, was rejected.

(vii) Defendant/Ghanshaym filed an appeal bearing Regular Civil Appeal No.14/2011.

(viii) During pendency of appeal, it was learnt by defendant, that Hiralal the plaintiff, had already transferred his right in the suit property to one Ravindra Chaudhari, by a sale deed dated 27.09.1994, as a result of which, an application under Order 41 Rule 27 of CPC, came to be filed, for bringing documents on record, which came to be rejected.

(xi) Regular Civil Appeal No.14/2011, was dismissed on merits by the First Appellate Court, affirming the findings and decree as passed by the learned Trial Court.

3. Mr. Shah, learned counsel for the appellant/defendant submits, that the rejection of the application under Order 41 Rule 27 fo the Civil Procedure Court (hereinafter referred as 'CPC') by the learned First Appellate Court was improper, as the sale deed dated 27.09.1994, went to the very root of the matter, inasmuch as it indicated, that the plaintiff, had lost title to the suit property as far back as 1994, and therefore, the very inception of the suit,

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HIGH COURT OF JUDICATURE AT BOMBAY

based upon the title, for recovery of possession, on 04.06.2007 by the plaintiff, was clearly without any right whatsoever. He contends, that it was the duty of the plaintiff, to have disclosed the execution and registration of the sale deed dated 27.09.1994 indicating, the loss of title and the suit instituted in suppression of the same, was clearly not maintainable in law. On the point of suppression, learned counsel placed his reliance upon **S.P. Chegalvaraya Naidu (Dead) By LRs. V/s Jagannath (Dead) By LRs. & Ors. 1994 (1) SSC 1; Ram Chandra Singh V/s Savitri Devi & Ors. 2003 (8) SSC 319** and **Tarachand Hassaram Shamdasani V/s Durgashankar G. Shroff & Ors., 2004 (Supp.) Bom. C.R. 333**.

3.1 On the point of Order 41 Rule 27 of CPC, Mr. Shah learned counsel for the appellant relies upon **K. Venkataramiah V/s A. Seetharama Reddy & Ors., 1964 (2) SCR 35**; **Billa Jagan Mohan Reddy & Anr. V/s Billa Sanjeeva Reddy & Ors., 1994 (4) SSC 659**; **Maria Margarida Sequeira Fernandes & Ors. V/s Erasmo Jack DE Sequeira (Dead) Through LRs., 2012 (5) SSC 370** and **Wadi V/s Amilal & Ors., 2015 (1) SSC 677**, and submits, that the First Appellate Court erred in law, in rejecting the application under Order 41 Rule 27 of CPC and the same needs to be allowed and the matter remanded back to the First Appellate Court, for appropriate action as per law.

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HIGH COURT OF JUDICATURE AT BOMBAY

3.2 He further submits, that the owner of the property, namely, Ravindra Chaudhari, has never come on record to claim possession, neither has said person ever called upon the defendant, to deliver possession.

3.3. Mr. Shah, learned counsel for the appellant submits, that the defendant, is in settled possession, since last several decades, which possession is evinced by the entries in the records of the municipal authorities, besides which the defendant, has paid the municipal taxes of the suit property, from prior to 1996 and therefore, the plaintiff, cannot claim ignorance of such entries and the possession of the defendant, in view of which, he submits, that the denial of the relief of declaring the defendant as owner by adverse possession, has wrongly been denied to the defendant. He further submits, that merely because, there may be some discrepancy in the pleadings by the defendant, that would not be a ground to oust him, as the true test would be whether the other side is taken up by surprise or its prejudice, for which reliance is placed on **Ms. Celina Coelho Pereira V/s Ulhas Mahabaleshwar Khokar, 2010 (1) SSC 217**.

4. Mr. Wani, learned counsel for the respondent/plaintiff submits, that the application under Order 41 Rule 27 of CPC has rightly been rejected by the First Appellate Court. He relies upon

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HIGH COURT OF JUDICATURE AT BOMBAY

the reasoning given by the First Appellate Court in his judgment. He submits, that when the defendant was placing reliance upon entries in the various records, to claim adverse possession, it was inconceivable that he would not be aware of the sale deed in favour of Mr. Ravindra Chaudhari and the First Appellate Court, has rightly rejected the application. He placed his reliance upon **Mahavir Singh & Ors. V/s Naresh Chandra & Anr., 2001 (1) SSC 309; Karnataka Board of Wakf V/s Government of India & Ors., 2004 (10) SSC 779; Ashabai W/o Ramchandra Kotecha & Ors. V/s Mohanlal S/o Bhika Badode (did) through his LRs. Smt. Munnabai w/o Mohanlal & Ors., 2012 (6) Mh.LJ 176** and **Union of India V/s Ibrahim Uddin and Anr., 2012 (8) SSC 148.**

4.1 Insofar as the claim of the plaintiff is concerned, Mr. Wani, learned counsel submits, that under the sale deed dated 05.12.1966, the plaintiff had acquired title to the suit property. He submits, that the defendant, has no concern with any transfer of the property, as under law, the plaintiff, was entitled to sue for possession from the defendant and upon receipt, it was open for the transferee to seek possession from the plaintiff. He submits, that merely because there was a transfer in the year 1994, that does not divest the plaintiff, from suing for possession, as under the provisions of Section 55 (6)(b) of the Transfer of Property Act,

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HIGH COURT OF JUDICATURE AT BOMBAY

1882, the transferee, was entitled for possession. Learned counsel Mr. Wani submits, that even presuming otherwise, that the transferee, due to the passage of time, consequent to the sale deed dated 27.09.1994, had lost the right to claim possession, that did not divest the plaintiff, from claiming possession, and delivering the same to the transferee, in compliance with the obligation upon the plaintiff, under Section 55 (6) (b) of the Transfer of Property Act, 1882.

4.2 Mr. Wani learned counsel further submits, that the defendant has woefully failed, in establishing the plea of adverse possession inasmuch as, there is no fulfillment of the requirement of law in this regard in the pleadings or for that matter in the evidence of the defendant. Learned counsel placed his reliance upon **Karnataka Board of Wakf** (Supra); **Dagdabai (Dead) By legal representatives V/s Abbas Alias Gulab Rustum Pinjari, 2017 (13) SSC 705; Prem Nath Khanna & Ors. V/s Narinder Nath Kapoor (Dead) Through LRs. & Ors., 2016 (12) SSC 235**; **Nandlal Sakharam V/s Babu Bhika and Ors., 1997 (3) Mh.LJ 650**;

4.3 Mr. Wani learned counsel therefore submits, that the courts below have correctly held the plaintiff to be entitled to possession.

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HIGH COURT OF JUDICATURE AT BOMBAY

5. In my considered opinion, in view of the substantial question of law as framed above, the other pleas, on merit of the matter, need not be considered.

6. The requirement of Order 41 Rule 27 of CPC as spelt out from the provisions, relating to the production of additional evidence in the Appellate Court are as under:

a) When the Lower Court has refused to admit evidence which ought to have been admitted, or

b) Inspite of diligence a party establishes that such evidence was not within its knowledge and therefore, the evidence could not be produced when the decree was passed by the Lower Court,

c) The Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial reason.

7. It is thus apparent, that Order 41 Rule 27 of CPC provides a window of opportunity to the party at the appellate stage, to bring in evidence, oral or documentary, provided the requirement as laid down therein are satisfied. Clause (a) of Order 47 Rule 27 (1) is not attracted in the present case as the documents were not sought to be produced before the Trial Court. That leaves

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HIGH COURT OF JUDICATURE AT BOMBAY

us with the due diligence clause or the existence of any other substantial cause.

8. Insofar as the due diligence provision as contained in clause (aa) of Order 41 Rule 27(1) of CPC is concerned, for the same to be attracted, it will have to be demonstrated that inspite of due diligence, the evidence was not within the knowledge of the party seeking to produce the same. In this regard, a perusal of the contents of the application under Order 41 Rule 27 of CPC dated 15/09/17 demonstrates that knowledge in respect of the document in question was claimed to have been received by the defendant when he is said to have made a search in the office of the Sub-Registrar and other places, whereupon, the sale deed dated 27/09/1994 was found, which indicated that the plaintiff had no right remaining in the suit property. It was also contended that the said document having been executed by the plaintiff, was intentionally suppressed by the plaintiff. The issue of due diligence has to be looked into with the background as to whether there was knowledge available in the public domain which could have been easily accessed by a party. It also has to be looked into from the angle of the duty of a party having knowledge about the additional evidence, to disclose the same in the proceedings.

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HIGH COURT OF JUDICATURE AT BOMBAY

9. A perusal of the reply Exhibit-22 of the plaintiff, to the application under Order 41 Rule 27 of CPC indicates, that he has not denied the existence of the sale deed dated 27/9/1994, on the contrary in Para-2 thereof, a plea is set up that by the filing of the document, the defendant was admitting that the plaintiff was the original owner of the suit property. This would clearly indicate, that the plaintiff was throughout aware about the sale deed dated 27/9/1994, by which he had transferred the suit property to the said Ravindra Chaudhari. Even otherwise, the plaintiff could not claim ignorance of such transfer of title as the plaintiff himself was a signatory and executant to the sale deed 27/9/1994. Thus having lost title to the suit property under the sale deed dated 27/9/1994, it was the bound duty of the plaintiff to have disclosed the same, in his plaint before the Trial Court as that was something which affected the very competency of the plaint as filed by the plaintiff. It is material to note, that the plaintiff himself being a signatory to the sale deed dated 27/9/1994 was specifically aware of the same, inspite of which, he kept quite about it and instituted the suit in the year 2007. During the pendency of the suit for nearly a period of five years, the plaintiff did not disclose that he had lost title to the suit property by transfer under the sale deed dated 27/9/1994 nor did he do so in the appeal, which was instituted in the year 2011. It was only when the defendant filed the application under Order 41

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HIGH COURT OF JUDICATURE AT BOMBAY

Rule 27 of CPC on 15/9/2017, that in his reply dated 16/9/2017 a lame excuse was put up that the production could not be permitted in appeal as it was without pleadings and would cause prejudice to the plaintiff. There is no whisper as to why the document, inspite of his knowledge, was not disclosed in the plaint, nor throughout the trial of the suit, and even in appeal which as indicated above, was filed in the year 2011, and even thereafter, till 15/9/2017 when the application under Order 41 Rule 27 of CPC was filed. It is further material to note, that in his reply at Exhibit-22, itself in Para-2 thereof, the plaintiff has categorically admitted that there were no entries in respect of the sale deed dated 27/9/1994 in either the 7/12 extract, the records of the city survey or the municipal records and therefore, it was difficult for any person to presume the existence of the sale deed dated 27/9/1994 in absence of its mutation entries in the city survey or municipal records. Though it is presumed in law, that registration of a document amounts to a notice to all, the law also enjoins the entries of such registration to be taken in all revenue and municipal records, which would make the existence of the document, known to all and also accessible. Thus, in absence of corresponding entries in the revenue and municipal records, and non-disclosure in the plaint, it was well neigh impossible for the defendant to have knowledge about the transfer.

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HIGH COURT OF JUDICATURE AT BOMBAY

10. It is necessary to state, that it is bound duty of each and every party to the suit, whatever his status, whether plaintiff or defendant, to make full and candid disclosure of all the relevant facts as well as documents necessary for deciding the lis before the Court and any suppression of any fact or document, would clearly dis-entitle such a party from relief claimed or defense raised. The very basis of a judicial inquiry and decision is a fair trial, free of suppression and filled with candid disclosure which every party to the litigation is duty bound to make. The position in this regard is clearly spelt out in **S.P. Chegalvaraya Naidu; Ram Chandra Singh and Tarachand Hassaram Shamdasani (Supra)**.

11. This being the position, when the plaintiff himself was charged with a duty to disclose which apparently he, as is now apparent intentionally did not do, nor was any entry of the document, caused to be taken in the revenue or municipal records rejecting the application on mere ground of absence of due diligence, in my considered opinion, would not sub serve the end of justice, rather would cause its failure and result in protecting a person who has apparently indulged into suppression of a material document which reflected upon his lack of title to the suit property.

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HIGH COURT OF JUDICATURE AT BOMBAY

12. It is not a case as if, the plaintiff has filed the suit on behalf of the transferee, for recovery of possession, so as to comply with his obligation under Section 55 (6) (b) of the Transfer of Property Act, 1882 for the plaint does not say so. The plaint on the contrary indicates, that the plaintiff has sued in his own right claiming ownership over the suit property. No doubt true that the defendant, who admittedly is in possession since long, also does not have any title to the same and his defense as to adverse possession has been rejected, that however does not absolve the plaintiff from the duty cast upon him to disclose the loss of title as a result of the sale deed dated 27/9/1994.

13. A perusal of the judgment of Appellate Court clearly indicates, that the rejection of the application under Order 41 Rule 27 of CPC is based upon non-consideration of the legal position as emanating from clauses (aa) and (b) of Order 41 Rule 27 (1) of CPC. The learned Appellate Court though has noted in Para-2 of the judgment the nature of the document soughts to be produced which were; (a) Sale deed entered between the plaintiff and Revindra Chaudhari and thereby the suit property was sold to the Ravindra Ranchod Chaudhari vide Registered deed dated 27/9/1994 for the consideration amount of Rs.33,000/- (b) Index list indicating the entry of sale deed (c) Index deed dated 13/01/1999 (d) record

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HIGH COURT OF JUDICATURE AT BOMBAY

list indicating the sale deed dated 13/01/1999 (e) Sale deed dated 14/01/1999 and (f) record list indicating the sale deed dated 14/01/1999, some of which are public documents. The Appellate Court in his judgment in Para-12 has noted, that the documents were in regard to the suit property and the sale deed proposed to be produced as additional document was a registered deed and the record of the same was duly maintained, however merely on the proposition that the documents though were certified copies obtained from the record, as they did not indicate the right of the defendant in the suit property (Para-18) has rejected the application, ignoring that the production of the additional evidence was for demonstrating the lack of title of the plaintiff and consequently, his locus to institute the suit, which went to the very root of the matter, and so also, ignoring the duty of the plaintiff to disclose the existence of the document.

14. **Mahavir Singh** (Supra) relied upon by Mr. Wani learned counsel for the plaintiff, considers clause (b) of Order 41 Rule 27 (1) of CPC, which was not invoked before the learned First Appellate Court and thus is of no assistance to him. **Karnataka Board of Wakf** (Supra), holds that parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that inspite of due diligence, they could not

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HIGH COURT OF JUDICATURE AT BOMBAY

produce such document and such document are required to enable to Court to pronounce proper judgment. In the facts of the present case, as observed above, there was no lack of due diligence on part of the defendant, due to absence of mutation entries and non-disclosure by the plaintiff and therefore **Karnataka Board of Wakf** (Supra), is equally not applicable. Similar is the position, in respect of **Ashabai Ramchandra Kotecha** (Supra). In **Ibrahim Uddin** (Supra), it was held, that if the additional evidence is found to have important bearing upon on main issue, or found to be necessary to remove any lacuna in evidence and for clearing any doubt for pronouncing judgment and required in the interest of justice, it may be allowed, however subject to due diligence being established. As discussed above, in the facts of the present case, the document i.e. the sale deed dated 27/9/1994, which divests the plaintiff of title to the suit property and goes to the very root of the matter, in institution of the suit before the Trial Court in the year 2007, is a document, which has a direct and substantial bearing upon the matter in issue, and was necessary for pronouncing judgment and what has been said about **Karnataka Board of Wakf** (Supra), equally applies in considering **Ibrahim Uddin** (Supra).

15. The judgment of the learned Appellate Court, thus cannot be sustained as the findings on the rejection of the

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HIGH COURT OF JUDICATURE AT BOMBAY

application under Order 41 Rule 27 of CPC is not sustainable on the touch stone of the parameters applicable. The entire judgment as passed by the First Appellate Court will therefore have to be set aside and is accordingly set aside and the matter is remanded back to the First Appellate Court to consider the application under Order 41 Rule 27 CPC as filed by the defendant, within the parameters laid down therefor and thereafter consider the matter on merits. Second Appeal is, therefore, allowed in the above terms. In these circumstances, there shall be no order as to costs. All pending Civil Applications stand disposed of in view of what has been held above.

(AVINASH G. GHAROTE, J.)

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