

(2015) 10 BOM CK 0156

In the Bombay High Court

Case No : Writ Petition St. No. 21423 of 2014

Bharmana Ramu Patil and Others

APPELLANT

Vs

Devappa Ranoji Sutar and Others

RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:

Citation : (2015) 10 BOM CK 0156

Hon'ble Judges : R.M. Savant, J.

Bench : Single Bench

Advocate : V.S. Talukte, for the Appellant; Anand Patil, for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J.—At the outset, the Learned Counsel for the Petitioners seeks deletion of the Respondent No. 7 who in the context of the challenge raised in the above Petition is a formal party. The said Respondent No. 7 is accordingly deleted at the risk of the Petitioners.

2. Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3. The Writ Jurisdiction of this Court is invoked against the order dated 19-7-2014 passed by the Learned District Judge -1 Gadhinglaj, by which order, the Appeal filed by the Petitioners original Plaintiffs being Misc. Civil Appeal No. 9 of 2014 came to be dismissed and resultantly the order dated 3-1-2014 passed by the Learned Civil Judge Senior Division, Gadhinglaj, rejecting the application Exhibit 5 filed for temporary injunction came to be confirmed.

4. The facts necessary to be cited for adjudication of the above Petition can in brief be stated thus:

"The subject matter of the Suit is land bearing Gat No. 34 admeasuring 6H 80R situated at village Malaviwadi Taluka Chandgad, District Kolhapur. The suit property is the 1/2 portion of the northern side admeasuring 3H 40R. The four

boundaries of the suit properties are mentioned in the plaint. The entire land in Gat No. 34 was originally bearing Revisional No. 191 after the consolidation scheme was implemented in the village in question. The said village Tudiye was divided into Tudiye and Malaviwadi and the land is now numbered as Gat No. 34 situate at Malaviwadi. Accordingly the suit property now is the 1/2 portion of northern side admeasuring 3H 40R of Gat No. 34 of Village Malaviwadi. It is the case of the Plaintiffs that the Plaintiff No. 5 being the father of the Plaintiff Nos. 1 to 4 had accepted the suit property on the rental basis for and on behalf of the joint family of the Plaintiffs. It is the case of the Plaintiffs that original owner Krishna Sutar put the Plaintiffs in actual possession in the year 1968. It is the case of the Plaintiffs that the Plaintiffs were occupying the suit property as tenant/occupant. It is the case of the Plaintiffs that they use to raise various crops like paddy, nagli, sugarcane, sweet potato on the suit property. It is their case that they were having cordial relations with the family of the said Krishna Sutar. It is further their case that the name of the Plaintiff No. 1 was recorded in the 7/12 extract on behalf of the joint family and that the said Krishna Sutar has during his life time given consent for entering name of the Plaintiff No. 1 in the revenue record. It is the case of the Plaintiffs that they are in actual physical possession of the suit property since last more than 45 years and that they have been cultivating and supplying the sugarcane to Daulat Sugar Factory, Halkarni. It is also their case that they have planted 150 cashew nuts trees and also dug a well and installed one oil engine on the said well. It is the case of the Plaintiffs that the Plaintiff No. 1 had not filed an application under Section 70-B of the Bombay Tenancy and Agricultural Lands Act, 1948 before the Tahsildar, Chandgad for a declaration as tenant. The said application came to be rejected by the Tahsildar. The tenancy Awal Karkoon by order dated 30-3-1989 allowed the application and declared the Plaintiff No. 1 as tenant. Aggrieved by the said order, the landlord Krishna Sutar challenged the same before the SDO by filing an Appeal. The SDO allowed the Appeal and set aside the order passed by the Awal Karkoon. The Plaintiff No. 1 carried the matter in Revision to the Maharashtra Revenue Tribunal (MRT). The MRT by judgment and order dated 29-6-1991 dismissed the Revision. It is the case of the Plaintiffs that after the MRT dismissed their Revision, they continued to be in occupation which occupation was adverse to that of the landlord Krishna Sutar. It seems that Krishna Sutar died on 28-9-1992, however, the Plaintiffs continued to be in possession till the year 2013 when the Defendant Nos. 1 to 3 that is the Respondent Nos. 1 to 3 in the above Petition started disturbing their possession in the year 2013 which according to the Plaintiffs constrained them to file the Suit in question being Regular Civil Suit No. 148 of 2013. The Defendants it seems were claiming on the basis of a Will executed by the wife of the said Krishna Sutar in their favour which Will is dated 16-1-2004. The Suit in question has been filed for a declaration that the Plaintiffs have become owners by adverse possession, for a further declaration of the Will dated 16-1-2004 executed by Gangubai alias Savitribai, is bogus. The Plaintiffs also sought permanent injunction for restraining the Defendants from interfering with their possession. The Defendant Nos. 1 to 3 that is the Respondent Nos. 1 to 3

herein filed their Written Statement and reply to the application for temporary injunction which was filed by the Plaintiffs in the Suit. The Defendant Nos. 1 to 3 adverted to the revenue proceedings initiated by the Plaintiff No. 1 culminating in the order dated 29-6-1991 passed by the MRT dismissing the Appeal. It was the case of the Defendant Nos. 1 to 3 that they have come in possession after 29-6-1991 and that they have acquired title to the property by virtue of the Will dated 16-1-2004 executed by the said Gangubai alias Savitribai in their favour."

5. The Trial Court considered the said application Exhibit 5 and by its order dated 3-1-2014 rejected the said application. The gist of the reasoning of the Trial Court was that the proceedings filed by the Plaintiff No. 1 for declaration as a tenant ended unsuccessfully against him as the Revision filed by the Plaintiff No. 1 before the MRT was dismissed by the Tribunal by order dated 29-6-1991. The Trial Court held that if the Plaintiffs' case is to be accepted, they were in adverse possession from 29-6-1991 and therefore if the period of 12 years is to be counted from the said date, the said period comes to an end in the year 2003 and therefore the Plaintiffs were required to file the Suit immediately after 2003, but have filed the instant Suit in the year 2013 and the said Suit was belated by 10 years. The Trial Court as can be seen from its order also held that after 29-6-1991, the Plaintiffs can be said to be in permissive possession if their case is to be accepted. The Trial Court by placing reliance on the Will executed by the said Gangubai alias Savitribai dated 16-1-2004, observed that the execution of the Will prima facie discloses that there was no dispute on the date of the execution of the Will and therefore the Defendants can be said to be in possession. The Trial Court therefore held that the Plaintiffs have not made out prima facie case and that the balance of convenience was also not in their favour and no loss would be caused to the Plaintiffs if the injunction was refused. The Trial Court accordingly by its order dated 3-1-2014 rejected the application for temporary injunction.

6. The Plaintiffs carried the matter in Appeal by filing Misc. Civil Appeal No. 9 of 2014. The Lower Appellate Court also adverted to the antecedent facts culminating in the order dated 29-6-1991 passed by the MRT. The Lower Appellate Court also placed reliance on the Will dated 16-1-2004 executed by the said Gangubai alias Savitribai in favour of the Defendants. Upon consideration of the material on record, the Lower Appellate Court did not deem it appropriate to interfere with the order passed by the Trial Court rejecting the application for temporary injunction. The Lower Appellate Court accordingly by the impugned order dated 19-7-2014 dismissed the Appeal and confirmed the order passed by the Trial Court dated 3-1-2014. It is the said order dated 19-7-2014 which is taken exception to by way of the above Petition.

7. Heard the Learned Counsel for the Parties.

8. The Learned Counsel for the Petitioners Mr. Talkute would reiterate the case of the Plaintiffs i.e. the original Plaintiffs before the courts below. It was the submission of the Learned Counsel that the Trial Court has placed undue reliance

on the Will dated 16-1-2004 executed by the said Gangubai alias Savitribai in favour of the Defendants, when the said document could not be relied upon in so far as the aspect of possession is concerned. It was the submission of the Learned Counsel that it is the case of the Plaintiffs that they are in possession since the year 1968 which is also fortified by the proceedings adopted by the Plaintiff No. 1 before the revenue authorities for declaration of tenancy and which possession has continued even after the MRT passed the order dated 29-6-1991, has not been controverted by the Defendant Nos. 1 to 3 by producing any cogent material to show that they are in possession. It was lastly the contention of the Learned Counsel that both the courts below have proceeded on an erroneous premise by placing reliance on the covenants in the Will rather than addressing the issue from the stand point of who is in possession.

9. Per contra, the Learned Counsel Mr. Patil, appearing on behalf of the Respondent Nos. 1 to 3 that is the Defendant Nos. 1 to 3 in the Suit, would support the impugned order. The Learned Counsel would also seek to place reliance on the Will dated 16-1-2004 executed in favour of the Defendants by Gangubai alias Savitribai. However, when confronted with the question as to which are the documents on which the Defendant Nos. 1 to 3 placed reliance to substantiate their case that they are in possession. The Learned Counsel had sought time on a previous occasion and today has tendered a bunch of documents which he fairly concedes were not placed before the Courts below though he claims were handed over to the Learned Advocate who was appearing for the Defendants in the Trial Court. The Learned Counsel also fairly concedes that the application for temporary injunction has therefore not been considered having regard to the said documents. The said documents were therefore not before the Trial Court or the Lower Appellate Court when they adjudicated upon the application Exhibit 5 and the Misc Civil Appeal. The Learned Counsel faintly sought to submit that the Defendants have come into possession after the MRT passed the order dated 29-6-1991.

10. Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, the instant Suit being Regular Civil Suit No. 148 of 2013 has been filed for declaration and injunction. The declaration sought is that the Plaintiffs have become owners by adverse possession, as also in respect of the Will dated 16-1-2004 executed by the said Gangubai alias Savitribai. The Plaintiffs have also sought an injunction for restraining the Defendants from interfering with their possession. It is an undisputed position that the Plaintiff No. 5 who is the father of the Plaintiff Nos. 1 to 4 has been put in possession by the original owner Krishna Sutar in the year 1968. It is also an undisputed position that the Plaintiff No. 1 had initiated proceedings under Section 70-B of the said Act, for declaration of tenancy. The said proceedings have culminated in the Revision Application filed by the said Plaintiff No. 1 being dismissed by the MRT on 29-6-1991. Hence the Plaintiff No. 1 was unsuccessful in getting himself declared as a tenant of the suit property. The question that is posed is, post 29-6-1991 that is after the MRT decided the matter whether the Plaintiffs

continued to be in possession. It is the case of the Defendant Nos. 1 to 3 that after the MRT decided the matter against the Plaintiff No. 1, the Plaintiff No. 1 surrendered the land in question to the said Defendant Nos. 1 to 3 and that they have come in possession. In respect of the said claim of the Defendant Nos. 1 to 3, there is absolutely no material on record. It is impossible to believe that a person in occupation along with his brothers and father and who had adopted proceedings for declaring him as an agricultural tenant would hand over possession on a platter to the Defendant Nos. 1 to 3. The Defendant Nos. 1 to 3 have also not demonstrated that they have adopted any proceedings for taking over possession from the Plaintiffs after the order was passed by the MRT on 29-6-1991. The Trial Court as can be seen from its impugned order has unnecessarily placed reliance on matters which are not relevant in so far as the aspect of possession is concerned. In so far as the aspect of possession is concerned, the Trial Court has sought to place reliance on the covenants in the Will dated 16-1-2004 to record a finding that at least on the date when the Will was executed there was no dispute and therefore the said Gangubai alias Savitribai executed the Will on 16-1-2004 in favour of the Defendant Nos. 1 to 3. How the covenants of the Will can extinguish the rights if any in respect of possession of third parties therefore begs an answer.

11. As indicated above, the Defendants have not placed any contemporaneous material on record to show that they are in possession. Per contra the Plaintiffs have placed material by way of receipts issued by the Daulat Sugar Factory, Halkarni, which indicates that the Plaintiffs have supplied sugarcane to the said sugar factory. The Plaintiffs have also relied upon the 7/12 extracts right from the year 1974-75 till 2013, wherein the names of the Plaintiffs have been recorded. The Trial Court in so far as the mutation entries are concerned, has rejected the same by observing that on account of mistake the names of the Plaintiffs continued to appear in the revenue record if after the year 1991. How entries made over a long period of time can appear by mistake is also a question that is required to be answered. It cannot be lost sight of that the father of the Plaintiffs i.e. the Plaintiff No. 5 was put in possession by the original owner in the year 1968. As indicated above, the Defendant Nos. 1 to 3 have not placed any material on record to show as to how they have obtained possession after 29-6-1991 that is after the MRT decided the Revision filed by the Plaintiff No. 1. This is the most important aspect which militates against the case of the Defendant Nos. 1 to 3 that they are in possession. As observed hereinabove, it is impossible to believe that an occupant who had at one time claimed agricultural tenancy would surrender the land in question to the owner on a platter.

12. In so far as the documents now sought to be placed on record by the Respondent Nos. 1 to 3 i.e. the Defendant Nos. 1 to 3 is concerned, admittedly the said documents were not before the courts below when they adjudicated the application for temporary injunction and the Appeal. Obviously the said material cannot be considered by this court for the first time in the Writ Jurisdiction of this Court.

13. In my view, therefore, the courts below have erred in not exercising jurisdiction in favour of the Plaintiffs by rejecting the application Exhibit 5. The impugned order dated 19-7-2014 passed by the Lower Appellate Court would stand set aside, the Appeal being Misc Civil Appeal No. 9 of 2014 would accordingly stand allowed. Resultantly the order dated 3-1-2014 passed by the Trial Court rejecting the application would stand set aside and the application for temporary injunction Exhibit 5 filed by the Plaintiffs would stand allowed. However, since it is the case of the Learned Counsel for the Respondent Nos. 1 to 3 i.e. the Defendant Nos. 1 to 3 that though the documents which are now sought to be placed before this Court were handed over to the Advocate appearing for the Defendant Nos. 1 to 3 in the Trial Court, but were not placed on record by the said Advocate. It would be open for the Respondent Nos. 1 to 3 to apply for modification or variation of the injunction which would operate pending the Suit by virtue of the instant order. This avenue is kept open, in the special facts of this case, since it is the case of the Respondent Nos. 1 to 3 i.e. the Defendant Nos. 1 to 3 that though the documents were handed over to the Advocate, they have not been placed on record by him. The keeping open of the avenue should not be construed as any expression of opinion as regards the acceptance of the claim of the Defendant Nos. 1 to 3 that the documents were handed over to their Advocate but were not placed on record by the said Advocate. If any such application is filed, needless to state that the Trial Court would consider the same on its own merits and in accordance with law, but having due regard to the fact whether the said documents would make any difference. Both the Learned Counsel request that the suit be expedited. The hearing of the Suit is accordingly expedited. Needless to state that the Suit would be tried on its own merits and in accordance with law.

14. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.