

(1996) 08 BOM CK 0007

In the Bombay High Court

Case No : Cross Objection No. 3 of 1994 and Order No. 5 of 1994

Francisco Joao Gil Barreto

APPELLANT

Vs

Shri Filipe Gama

RESPONDENT

Date of Decision : 07-08-1996

Acts Referred:

Stamp Act, 1899 — Section 35

Citation : (1997) 99 BOMLR 59

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Judgement

R.K. Batta, J.—The appellant (plaintiff in the suit) had filed a suit for permanent injunction in order to restrain the respondent (defendant in the suit) from plucking coconuts and tapping toddy from the coconut trees in the suit properties and from entering in the suit properties. The appellant also sought damages to the tune of Rs. 26,000/-. An application for temporary injunction was filed in the said suit which was dismissed with reference to Chalta Nos. 6 to 9 of P.T. Sheet No. 143 and Chalta No.34 of P.T. Sheet No. 125. In respect of Chalta No. 20 of P.T. Sheet No. 145, the lower Court came to the conclusion that the plaintiff was in possession of the same. The appellant challenges the said order dated 30th August, 1993.

2. Plaintiff s case, in brief, is that the said suit properties, chalta numbers of which have been enumerated above situated at Vaddem belonged originally to Fr. Jose Gabriel Barreto who by Will dated 9th November, 1965 bequeathed the same to the appellant. The coconut trees in the said properties were allowed to be plucked by Alzira Barreto Mascarenhas by the appellant on moral grounds and she had engaged the respondent as caretaker who used to sell the coconuts for the said Alzira Mascarenhas and keep some commission for himself. The appellant, was previously residing at Portugal, came to Goa in 1991 and authorised his brother Advocate J.A. Barreto and his sister-in-law to do the plucking. The respondent was paid Rs. 5400/- for his services as caretaker and

his services were terminated. The case of the appellant further is that his Attorney plucked the coconut trees in January, 1993 and April, 1993, but in the later plucking respondent interfered and took away 100 coconuts after which a criminal complaint was lodged with the Police and a private criminal complaint was filed before the J.M.F.C, Vasco-de-Gama. The suit came to be filed in the above mentioned circumstances.

3. The respondent, on the other hand, claimed to be tenant of the said properties for the past 45 years and submitted that he had become deemed owner. The case of the respondent is that Rosario Ernesto Barreto had leased the said properties to him about 45 years ago by document dated 2nd January, 1949 and after the suit properties were inherited by Fr. Jose Barreto lease was confirmed by another document dated 27th January, 1971. He relied upon various rent receipts from the years 1965 to 1991.

4. The trial Court, by a detailed order, held that the presumption u/s 105 of the Land Revenue Code had been rebutted by the respondent by producing documentary evidence including rent receipts. No affidavit was filed by Alzira who was purportedly managing the suit properties for a long time and that evidence on record prima facie established that the respondent was in possession of the suit properties bearing Chalta Nos. 6 to 9 of P.T. Sheet No. 143 and Chalta No. 34 of P.T. Sheet No. 125. In respect of Chalta No. 20 of P.T. Sheet No. 145 the trial Court came to the conclusion that the appellant could be presumed to be in possession of the same, yet no relief in respect of the same was granted by the trial Court and the application was dismissed as a whole.

5. Learned Advocate Shri Barreto submitted before me that the presumption u/s 105 of the Land Revenue Code cannot be said to be rebutted by the documentary evidence produced by the respondent and in this connection he relied upon Shri Winston Pereira v. Shri Rama Gadekar and Ors. 1989(2) Goa LT 255 and Shri Damodara Ranum Porobo Loundo v. Shri Bhasker R. Jalmi and Ors. 1990 (2) Goa L.T. 407. In respect of documents dated 2.1.49 and 27.1.1971, it was submitted that the said documents are fabricated documents and that the same are not executed by the persons shown therein and even the receipts produced by the respondent are also fabricated.

6. The next contention advanced by learned Advocate Shri Barreto is that no tenancy rights could be created by the persons through whom the said rights are claimed as the said persons had no right to the properties and in this connection reliance has been placed on Rentala Latchaiah and Others Vs. Chimmappudi Subrahmanyam, and Lov Raj Kumar v. Dr. Major Daya Shankar and Ors. AIR 1986 DeL 364. It is also submitted that the Civil Court has no jurisdiction to decide tenancy issue.

7. On the other hand, it was submitted by learned Advocate Shri S.S. Katak that application for declaration of tenancy u/s 7 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (hereinafter called the said Act) has already been

filed by the respondent before the Mamlatdar; that the respondent had also filed an application u/s 8 A of the said Act in which the Mamlatdar has passed an ex-parte order on 10.3.95 restraining the appellant from interfering with the possession of the suit properties of the respondent and the said injunction is still operating; that the appellant had never disputed the handwriting or signatures on the documents produced by the respondent, as can be seen from the affidavit-in-rejoinder filed by the appellant; that the suit properties are recorded in the predial records of land in the name of Rosario Ernesto Barreto who had leased the suit properties initially to the appellant and that the respondent has produced ample documentary evidence including rent receipts to prima facie substantiate his claim of tenancy which is now being agitated by the respondent before the competent authority.

8. In respect of cross-objections, it was submitted by learned Advocate Shri Kantak that the findings of the trial Court that possession of Chalta No. 20 of P.T. Sheet No. 145 was prima facie with the appellant is not correct and is not borne by the material on record.

9. Shri Barreto further submitted that the expression "arrendamento " used in the rent receipts does not amount to lease of property but it is restricted only to lease of trees and in addition he placed reliance on the ruling of the Apex Court in Board of Revenue and Others Vs. A.M. Ansari and Others, in order to demonstrate the distinction between lease and licence. In reply learned Advocate Shri Barreto had also raised the question of stamping of the lease document under the Indian Stamp Act and in this connection reliance was placed on Section 35 of the said Act. The learned Advocate Shri Kantak submitted that the lease could be oral or in writing and even if the document is not stamped it can be used for collateral purpose and in addition to the lease agreement, the respondent has produced rent receipts in support of his case.

10. Admittedly the suit properties are recorded in the name of the appellant as occupant thereof and the name of the respondent does not figure in the Record of Rights at all. There is a presumption u/s 105 of the Land Revenue Code as to correctness of Record of Rights entries which provides that an entry in the Record of Rights and a certified entry in the register of mutation shall be presumed to be true until contrary is proved or a new entry is lawfully substituted therefor. This means that the presumption which arises u/s 105 of the Land Revenue Code is not an un rebuttable presumption but is capable of being rebutted by producing evidence to the contrary. It has been held by a Single Judge of this Court in Shri Damodara Ranum Porobo Loundo v. Shri Bhasker R. Jalmi and Ors. 1990 (2) Goa L.T. 407 that the entries in the Record of Rights cannot be rebutted by affidavits.

11. In the case under consideration the respondent has produced a document dated 27th January, 1971 and another document dated 2nd January, 1949 to show that the suit properties were granted on lease to him and in addition to the said documents he has produced a large number of receipts of payment of rent.

Admittedly the suit properties initially belonged to Fr. Jose Gabriel Barreto and receipt dated 27th January, 1971 is purported to be issued by him. In arguments before me, it has been contended that the said receipt is fabricated since it is not in the handwriting and under the signature of Fr. Jose Gabriel Barreto. Similar contentions have been urged in respect of the other document dated 2nd January, 1949. It is pertinent to note that the stand taken by the appellant in affidavit-in-rejoinder filed by him in the trial Court was not to this effect. In the said affidavit the appellant never specifically raised any plea that the said documents are not in the handwriting and signatures of the persons mentioned therein. What was stated in the affidavit-in-reply was that the said papers did not relate to the suit properties; that Ernesto Barreto was not the owner of the suit properties and that the said documents issued by Alzira are nothing but scrap of paper since none of them were owners of the suit properties. At this stage, I will also refer to the contention of learned Advocate Shri Barreto that the said persons could not have granted lease or any other writing in favour of the respondent since the said persons had no right to the properties. I have already pointed out that admittedly Fr. Jose Gabriel Barreto was the original owner of the suit properties. It may also be pointed out that in the predial land records the name of Ernesto Barreto is recorded who had executed the second document dated 2nd January, 1949. The rent receipts in question are said to have been issued by Alzira who was admittedly looking after the suit properties on behalf of the appellant. Therefore, under these circumstances it cannot be said that the said documents have been executed by persons who have absolutely no title or right to the suit properties. The Apex Court in the case of *Rentala Latchaiah and Others Vs. Chimmappudi Subrahmanyam*, was dealing with a case where the person inducting tenants on land was herself found to be trespasser on the date of such induction and it was held that such inducted tenants cannot continue to have right to be on that land against the true owner. The facts under consideration are distinguishable and the ruling of the Apex Court do not apply to the facts and circumstances of this case.

12. Learned Advocate Shri Barreto relying upon the expression "arrendamento" used in the documents dated 27th January, 1971 and 2nd January, 1949 submitted that "arrendamento " relates to lease of coconut trees only and no right to the land has been transferred under the said documents. In this connection reliance has also been placed on the ruling of the Apex Court which draws distinction between lease and licence. In the said case an agreement merely granting right to pluck, cut, carry away and appropriate forest produce was held to be a licence and not a lease so as to attract the provisions of the Stamp Act. It was pointed out by the Apex Court that whether a transaction creates a lease or licence is always a question of intention of the parties which is to be inferred from the circumstances of each case and for the said purpose it is essential to look to the substance and essence of the agreement and not to its form. The agreements in the case before the Apex Court were for short periods of 9 to 10 months and taking the said circumstances into account the Apex Court

had held that the said agreements for short periods of 9 to 10 months did not create any interest in the land.

13. In the case under consideration the first document dated 2nd January, 1949 was for a period of nine years and the second document dated 27th January, 1971 was for three years from 1971 to 1973. In addition to these documents, the respondent has produced large number of receipts from the years 1963 to 1990. There are three receipts issued by Ernesto Barreto, wherein receipt of lease rent of the properties at Vaddem is mentioned. These receipts did not mention that the said receipts pertain only to rent of coconut trees. Likewise receipts which are purported to have been issued by Alzira also mention the receipt of the lease rent in respect of the properties at Vaddem though, some of the receipts only mention about receipt of money.

14. The final intention of the parties, can, of course, be gathered only after the evidence is recorded, but on the basis of whatever material is available on record, there is sufficient justification to come to the conclusion that the suit properties are prima facie on lease with the respondent and this finding is arrived at prima facie in view of the fact that the plaintiff claimed permanent injunction against the respondent in respect of the suit properties. The question of tenancy, of course, shall be finally decided by the competent Court and in this respect the respondent has already moved appropriate authority under the Tenancy Act and it is reported that the Tenancy Court has also granted ex-parte injunction against the appellant and has restrained him from interfering with the suit properties. Prima facie therefore, presumption u/s 105 of Land Revenue Code stands rebutted in view of the material on record.

15. Accordingly, the conclusion which is arrived at by the trial Court in respect of Chalta Nos. 6 to 9 of P.T. Sheet No. 143 and Chalta No. 34 of P.T. Sheet No. 125 cannot be faulted with since the same is based on material on record. It may also be pointed out here that the appellant had not filed any other affidavit besides his own along with the temporary injunction application and the affidavit of the appellant was rejected by the Trial Court since the same was not in conformity with Order 19, Rule 3 C.P.C. The appellant had not filed the affidavit of Alzira and the said affidavit was sought to be filed in appeal before this Court, but the request of the appellant was rejected vide Order dated 22nd July, 1996. The appellant had thus failed to make out any prima facie case and the trial Court rightly rejected the application for temporary injunction.

16. In the same order, application for receivership was also dismissed, but the said order of receivership was not challenged in this appeal nor any arguments were advanced before me in respect of the same.

17. Coming to the cross objections relating to Chalta No. 20 of P.T. Sheet No. 145, it is to be seen that the trial Court has not granted any injunction in favour of the appellant even though the Court prima facie came to the conclusion that the appellant was in possession of the said Chalta No. 20 of P.T. Sheet No. 145

and the temporary injunction application as a whole was dismissed. The findings of the trial Court in respect of Chalta No. 20 of P.T. Sheet No. 145 that the same is to be presumed in possession of the appellant are prima facie correct. The respondent had filed an application for mutation of entries in his favour as tenant before the Inquiry Officer, City Survey, Vasco-de-Gama on 23.9.88 wherein Chalta No. 20 of P.T. Sheet No. 145 does not at all figure whereas Chalta Nos. 6 to 9 of P.T. Sheet No. 143 and Chalta No. 34 of P.T. Sheet No. 125 are specifically mentioned. Moreover, in respect of Chalta No. 20 of P.T. Sheet No. 145 the appellant had filed an application for correction of boundaries of the said Chalta number and for confirmation of the same in his favour though there was no necessity for seeking confirmation of Chalta No. 20 of P.T. Sheet No. 145 in favour of the appellant since the same was already recorded in his favour, but it is to be noted that respondent had not raised any objection to the same and on the contrary had confirmed it. The trial Court was, therefore, not right in dismissing the temporary injunction application as a whole specially when it had come to the conclusion that the appellant was prima facie in possession of Chalta No. 20 of P.T. Sheet No. 145. The said findings are based on material on record and I do not find any infirmity in the said findings. The cross-objections relating to Chalta No. 20 of P.T. Sheet No. 145 is, therefore, liable to be dismissed and to this extent the appellant succeeds and is entitled to injunction against the respondent.

18. For the reasons mentioned above, the appeal is partly allowed with reference to Chalta No. 20 of P.T. Sheet No. 145 and the respondent Filipe Gama is hereby restrained from interfering with the same till final disposal of the suit. Insofar as application for injunction relating to Chalta Nos. 6 to 9 of P.T. Sheet No. 143 and Chalta No. 34 of P.T. Sheet No. 125 are concerned, the appeal is dismissed.

19. The respondent was directed to deposit Rs. 3000/ per year vide Order dated 4.3.94 of this Court. During the pendency of this proceeding he had deposited Rs. 3000/- for the year 1994, but he has not deposited the said amount of Rs. 3000/- for the years 1995 and 1996. He is therefore, directed to deposit the said amount of Rs. 6000/- in the trial Court within a period of one month from today and the appellant shall be permitted to withdraw the said amount without prejudice to the rights of the parties.

20. Rule accordingly. In the facts and circumstances, I would leave the parties to bear the costs.