

(2011) 11 BOM CK 0064

In the Bombay High Court

Case No : Writ Petition No. 4586 of 2011

Gorakh Mahadev Survase and Others

APPELLANT

Vs

Narayan Balu Dhombe since deceased through his legal heirs

RESPONDENT

Date of Decision : 22-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2012) 2 ALLMR 508 : (2012) 5 BomCR 452 : (2012) 2 MhLj 215

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

Bench : Single Bench

Advocate : Prabhakar Jadhav, for the Appellant; Vinod Y. Jadhav for the Defendant Nos. 1 to 4 and 6, for the Respondent

Judgement

R.M. Savant, J.—Rule, by consent of the parties made returnable forthwith and heard.

2. The above Petition takes exception to the order dated 23/2/2011 passed by the learned District Judge¹, Malshiras by which order Misc. Civil Appeal No.5 of 2010 filed by the Respondents herein came to be allowed, and resultantly the order dated 18/1/2010 passed by the learned 3rd Joint Civil Judge, Junior Division, Malshiras in Regular Civil Suit No.549 of 2008 granting temporary injunction to the Petitioners came to be set aside.

3. Shorn of unnecessary details, a few facts necessary to be cited for the adjudication of the above Petition can be stated thus :

The Respondents herein are the original Plaintiffs. They filed a suit for permanent injunction against the Petitioners/Original Defendants from obstructing and illegally encroaching upon the suit land being Gat No.437 admeasuring 3 H. 64 Ares, Pot Kharaba 8 acres, situated at Mouje Tandulwadi, Taluka Malshiras, District Solapur. It appears that the said land was the part of the lands owned by the father of the Petitioners. It appears that the said lands were partitioned and whilst partitioning the lands, the name of the Plaintiff came to be recorded in

respect of the land in question on 26/6/1967 in stead of the name of the brother of the Petitioner one Eknath Mahadev Survase, and Mutation Entry No.456 accordingly came to be effected. It is the case of the Petitioners that taking disadvantage of the same, the Plaintiff filed the said Regular Civil Suit No. 549 of 2008. In the said suit, an Application Exhibit5 came to be filed for temporary injunction. The Petitioners, who were the Defendants, filed their Counter Claim and also filed an application for temporary injunction. It was the case of the Petitioners that they were in continuous occupation and possession of the said land. It would be relevant to note at this stage that the plaint is conspicuously silent as to how the Plaintiff has come in possession of the said land.

4. Per contra, it is the case of the Defendants i.e. the Petitioners herein that the entry made in favour of one Narayan Balu Dombé was hollow as it has no basis and that he was not in possession of the suit property. It was further the case of the Defendants that the brother of the Plaintiff Dattu Balu Dombé had got mutation in his name cancelled as per the assurance given by him to the Defendants i.e. the Petitioners. The said Application Exhibit5 was rejected by the trial Court by the order dated 18/1/2010, and the Application for temporary injunction in the Counter Claim filed by the Defendants came to be allowed by the said order, and resultantly, the Plaintiffs were restrained from disturbing the possession of the Defendants.

5. Aggrieved by the said order dated 18/1/2010, the Plaintiffs filed an Appeal. The Appellate Court on the basis that the Defendants did not take objection at the time when the mutation entry in respect of the brother of the Plaintiff was deleted and also did not take exception to the entry made in the revenue records in favour of the Plaintiff for the last so many years, allowed the said appeal, and resultantly, the injunction operating in favour of the Defendants was set aside.

6. In so far as possession is concerned, though a finding has been recorded by the Appellate Court, the said finding is not backed by any reason or any material which has been adverted to by the Appellate Court to record such a finding.

7. In the course of the hearing of the present Petition also, though called upon to do so, the parties were not in a position to produce any material to substantiate their case of being in possession in respect of the suit land. The First Appellate Court has merely gone on the basis of two circumstances mentioned herein above viz. that the Defendants have not objected at the time when the mutation entry in favour of the brother of the Plaintiff was deleted, and also have not taken objection for number of years though the name of the Plaintiff Narayan was appearing in the revenue record, granted the injunction in favour of the Defendants. Though it is trite that the revenue record has presumptive value, some other corroborative material is required to sustain a case of possession. However in the instant case that material is woefully lacking.

8. On facts as indicated upon the parties have not been able to substantiate their case of possession, which is the most vital aspect in so far as the grant of

injunction is concerned. Hence the impugned order dated 23/2/2011 would have to be set aside and is accordingly set aside, and on such setting aside it would be just and proper to exercise powers under Rule 1 of Order 40 of the CPC by keeping the property custodia legis, pending the suit so that the interest of both the parties would stand protected till such time as the said suit is adjudicated. The Nazir of the District Court, Malshiras is appointed as a Receiver of the suit property with all powers under Rule 1 of Order 40 of the Code of Civil Procedure. The Nazir to take possession of the suit property from whosoever is in possession. The Nazir may invite the bids from the two parties i.e. the Plaintiffs and the Defendants for cultivating the suit property and put the highest bidder in possession of the same, pending the suit on a yearly basis. The hearing of the said suit is expedited. Rule is accordingly made absolute to the said extent with the parties to bear their respective costs. The Petition is accordingly disposed of.