

(1985) 10 BOM CK 0060

In the Bombay High Court

Case No : Appeal From Order No. 14 of 1985, with Civil Revision Application No. 753 of 1985 (Now converted as A.O. No. 38 of 1985)

Krushna Pandurang Wankhede

APPELLANT

Vs

Sitaram Punjaji Wankhede
 Sitaram Punjaji Wankhede
Vs Krishna Pandurang Wankhede and Others

RESPONDENT

Date of Decision : 25-10-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 4, Order 43 Rule 1

Citation : (1986) 3 BomCR 28 : (1986) MhLj 865

Hon'ble Judges : M.S. Deshpande, J

Bench : Single Bench

Advocate : J.N. Chandurkar, in A.O. No. 14/85 and Ram Lambat, in C.R.A. 753/85, for the Appellant; J.N. Chandurkar, respondent in CRA 753/85 and S.C. Mehadia, for respondent in A.O. No. 14/85, for the Respondent

Final Decision : Allowed

Judgement

M.S. Deshpande, J.—Appeal from Order No. 14 of 1985 and Civil Revision Application No. 753 of 1985 (now converted as Appeal from Order No. 38 of 1985) have been filed respectively by the original plaintiff and the first defendant against the order passed by the learned Additional District Judge, Akola, restraining the defendants from ousting the plaintiff from the joint possession and enjoyment of the suit property.

2. The original suit was brought by the plaintiff for a perpetual injunction restraining the defendants from interfering with his possession and enjoyment of the suit land. The plaintiff's case was that Survey No. 26/1, 7 acres 23 gunthas and Survey No. 25/7 acres 13 gunthas of Morgaon had been taken by him on lease and to Revenue Case No. 1418 of 1963, decided on 30-9-1967 he was declared to be a statutory owner of Survey No. 25. By the order dated 30th July, 1965 in Tenancy Case No. 1/59 of 1964-65 he was declared to be statutory owner of Survey No. 26/1. These two lands came to be amalgamated and it was

given Block No. 23. According to the plaintiff the defendants had no right, title or interest in these lands, but they started interfering with his possession. An application for temporary injunction was made to the trial Court and it granted an ex parte injunction in the terms prayed by the plaintiff and after hearing the parties, it confirmed the ex parte injunction on 10-8-1981. In Miscellaneous Appeal No. 74 of 1981 taken by the defendants the learned Joint Judge, Akola passed an order vacating the injunction granted by the trial Court on 11-2-1982. In Civil Revision Application No. 178 of 1982 this Court set aside the order passed by the Court of appeal and restored the injunction which had been granted by the trial Court which was decided on 13th August, 1982.

3. After a full trial the trial Court dismissed the suit on 16-2-1985. An application for temporary injunction was filed by the plaintiff, who was the appellant before the District Court and the learned Second Additional District Judge by the order passed on 29th March, 1985 passed the impugned order holding that on the basis of the pleas raised by the defendants and the conclusion reached by the trial Court on merits, the plaintiff would be entitled to a share in the property as it was held to be joint family property and that he would, therefore, be entitled to joint possession along with the first defendant.

4. Feeling aggrieved by this order the plaintiff brought Appeal against Order No. 14 of 1985 contending that he was entitled to temporary injunction restraining the defendants from interfering with possession and enjoyment of the property and that the Appellate Court had erred in granting only a limited injunction as stated above. On the other hand, the first defendant by filing Civil Revision Application No. 753 of 1985 (now A.O. No. 38 of 1985) contends that as the suit was dismissed and the defendant No. 1 was held to be the owner of the property even the limited injunction ought not to have been granted by the learned Additional District Judge.

5. On behalf of the first defendant, it was contended that no appeal lay from the order passed by the District Court u/s 104(1) of the CPC and only a revision should have been brought it is difficult to accept this contention because u/s 104(1), Civil P.C. an appeal shall lie from the orders enumerated therein and that includes any order made under rules from which an appeal is expressly allowed by rules. Any order made under Rules 1, 2, 4, 10 and 11 of Order 39 would be appealable. According to the learned Counsel for the first defendant, these provisions would apply only in respect of the order passed by the trial Court and not when an application is made to the Court of appeal from the decree and the Appellate Court is seized of whole suit as a Court of appeal. Section 104(1) of the Civil P.C. however, makes no such distinction. The application made to the District Court was evidently one made under Order 39, Civil P.C. and that was an original proceeding from which an appeal would lie in view of the provisions. Order 43, Rule 1(r), Civil P.C. This was also the view taken in *Mayarani Dutta Vs. Bhupal Banerjee*, ; *K. Gangulappa Naidu and Others Vs. K. Gangi Naidu*, , and *Ramaswamy Reddior v. Chinna Sithammal*, AIR 1976 Mad 63. In the case of K.

Gangulappa Naidu (supra), the facts were similar and the learned Judge held that a regular appeal pending before the Appeal Court if an order is passed under Order 39, Rules 1 and 2, or as a matter of fact under any of the orders than the appeal is maintainable under order 43, Rule 1 Civil P.C. as all such orders are appealable under Order 43, Civil P.C. There is, therefore, no substance in the plea that no appeal lay from the order passed by the learned Additional District Judge on 29th March, 1986.

6. Shri Lambat, the learned Counsel for the defendant No. 1, who had filed Civil Revision Application No. 753 of 1985, urged that if I were to hold, that an appeal lay from an order passed under Order 39, Rules 1 and 2 C.P.C. to the Appellate court when it was seized of the appeal from original decree than he should be permitted to have his revision application treated as an appeal. I think that this request must be granted and I, therefore, allow Civil Revision Application No. 753 of 1985 to be converted into an appeal.

7. The learned Additional District Judge observed in paragraph 3 of his judgment that a detailed investigation into the controversy as to whether the plaintiff is the exclusive owner of the property or the said property was owned by the joint family was not possible and took a note of the observations of the trial Court that it was not necessary to decide in what capacity the parties to the suit were in possession of the suit property or whether the plaintiff was a tenant of the fields and as such he became the statutory owner thereof. The learned trial Judge apparently passed his judgment while dismissing the suit on the question of cultivation and physical possession of the property and on these factors alone reached the conclusion that the plaintiff was not entitled to a permanent injunction. The learned Additional District Judge, however, was not right in his observation that since the trial Judge had dealt with the point of actual possession elaborately on merits, it was not advisable to weigh the evidence on that point in the interlocutory matter. When apparently in the view of the learned Additional District Judge himself the trial Court had not looked to various documents and had not considered the questions of title, it was necessary for the learned Additional District Judge *prima facie* to consider what were the documents in favour of the plaintiff and determine whether the conclusion reached by the trial Court were *prima facie* correct.

8. It is noteworthy that the case of the defendant No. 1 was that the land was held in the name of the plaintiff, who was a minor, as a tenant and he was greatly influenced by the circumstances that when the two Kabuliyats were obtained the plaintiff was a minor. It is true that the Kabuliyats were not registered documents, but it is apparent that the rights which the plaintiff claimed as a tenant arose on the basis of the two kabuliyats which were for five years and even in the proceedings initiated for determining the question of statutory ownership, the plaintiff came to be declared as a statutory owner of the two lands on the basis of the previous lease which he had held. There is no dispute about the fact that the plaintiff had been declared to be statutory owner

of these lands. Merely because the plaintiff had been a minor on the day on which the Kabuliyats were obtained, it would not follow that everything that followed had become illegal and that the plaintiff could not have derived any title despite his obtaining the decision to the effect that he had become the statutory owner of the lands. The matter required further consideration and since an appeal was pending from the decision in the suit - by the trial Court, the conclusions reached by the trial Court had no finality. It was necessary for the Court of appeal to consider all the circumstances afresh when the application for temporary injunction was made to it. There was no dispute also about the fact that the cross statement in respect of the lands showed that the plaintiff had cultivated the lands. The trial Court referred to the admission of the plaintiff's father that after the first defendant had shifted to Morgaon his children resided jointly with Pandurang for their education. May be the family was joint, but that did not preclude any of the members of the joint family from holding separate lands. It is also apparent that proceedings had been initiated for getting the names in the crop statements corrected and to these proceedings the first defendant was made a party. The findings in these proceedings was that the plaintiff had been cultivating the suit fields in his personal capacity. The trial Court was not inclined to accept these findings because they were reached by an administrative officer and the proceedings before him were not judicial proceedings. It is not for me here to say anything at this stage about the correctness of the observations made by the learned trial Judge because the matter will have to be considered by the District Court while hearing the appeal on merits and anything that I might say might prejudice one party or the other when the case is being considered on merits in appeal. However, it appears to me that having regard to the material on record, it could not be said that the plaintiff had not made out a prima facie case and he had not been in possession on date of the filing of the suit.

9. It is noteworthy that the interim injunction granted by trial Court against the defendants from the date of the institution of the suit operated until it was set aside by the learned Joint Judge, Akola in Miscellaneous Appeal No. 74 of 1981 on 11-2-1982, and it came to be restored by this Court in Civil Revision Application No. 178 of 1982 on 13th August, 1982 and continued until the suit was dismissed on 16-2-1985 by the trial Court. The learned Additional District Judge should have considered all these factors before refusing the interim injunction sought by the plaintiff. Having regard to the circumstances of the case I find that the injunction in terms sought by the plaintiff should have been granted until the decision of this appeal. Shri Lambat for the defendant No. 1 stated that instead of granting the injunction to the plaintiff, he should be permitted to continue in possession because he has sown crop in the land and it had become ripe for harvesting. This position was contested by Shri Chandurkar, learned Counsel for the appellant. Since I am taking the view that the learned Additional District Judge should have granted the injunction in terms sought by the plaintiff and there is dispute about the person who is actually in possession of

the land today and there is no material to verify the rival claims, it would be only proper to ask the plaintiff to furnish security in the sum of Rs. 10,000/- for protecting the interest of the defendant No. 1 in the event of his succeeding in the appeal pending before the District Court.

10. In the result, Appeal from Order No. 14 of 1985 is allowed and the Appeal from Order No. 38 of 1985 (Previously numbered as Civil Revision application No. 753 of 1985) is dismissed. The order passed by the learned Additional District Judge is modified inasmuch as there would be a temporary injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment of the suit lands until the decision of the appeal in the District Court subject to the plaintiff's furnishing security in the sum of Rs. 10,000/- within (sic) to the satisfaction of the District Court for meeting the claim of the defendant No. 1 in the event of his succeeding in the District Court. There will be no order as to cost of these two appeals in the District Court.

Appeal allowed.