

(1995) 06 GUJ CK 0008
In the Gujarat High Court

Manubhai Bhagabhai Patel

APPELLANT

Vs

Cheebabhai Rambhai Patel

RESPONDENT

Date of Decision : 28-06-1995

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 7 , 9
Civil Procedure Code, 1908 (CPC) — Section 115, 115(1)
Evidence Act, 1872 — Section 110

Citation : (1995) 2 GLR 1369

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Judgement

Y.B. Bhatt, J.—In the present revision application the petitioner is the original plaintiff and appellant in the lower appellate Court, whereas the respondent herein is the original defendant and respondent in appeal.

2. The plaintiff had filed Regular Civil Suit No. 67 of 1990 in the Court of Civil Judge (Senior Division), Navasari for declaration and permanent prohibitory injunction, together with injunction application therein at Exh. 5.

3. The plaintiffs case was that he was already the owner of block Nos. 33 and 35 of village Bharwadi. He thereupon purchased the adjoining and contiguous lands, viz., block Nos. 38, 39 and 40 from different owners-vendors by registered sale deeds, for the purpose of cultivation. So far as block No. 37 is concerned, the then owner Shri Kuverji Naranji Patel had executed an agreement of sale in favour of plaintiff, had handed over possession to the plaintiff, and had also executed a Kabja receipt in favour of the plaintiff. So far as block Nos. 38, 39 and 40 are concerned, the plaintiff acquired possession from the then owners on execution of the relevant registered sale deeds. The plaintiff averred that the defendant has off and on attempted to disturb the possession of the plaintiff in respect of these properties including block No. 35, which was already of the ownership of the plaintiff, that the defendant has attempted to disturb his

possession by entering into the property and threatening the plaintiff with destruction of the planted crops. According to the plaintiff, the defendant had no right, title or interest in the property, nor did he have possession of the suit property and was attempting to disturb the possession of the plaintiff by attempting to enter into the property as a trespasser.

4. It was also the plaintiffs case that although block No. 35 originally acquired by him was a "fragment" of land, and although block Nos. 37, 38, 39 and 40 were also "fragment", the different sales in his favour of such "fragments" were legal and valid sales, on account of the fact that he was an agriculturist and already the owner of one such "fragment", viz., block No. 35, and the various sales in favour of such a person (as the plaintiff) under the given circumstances was permissible under the Bombay Prevention of Fragmentation Act, 1947 (hereinafter referred to the said Act), and that the general bar against sale of "fragments" envisaged by Sections 7 and 9 of the said Act would not come in his way. The plaintiff, therefore, prayed for a declaration that he has become the owner by acquiring legal title to the suit lands. The plaintiff also prayed for a permanent prohibitory injunction seeking to restrain the defendant from entering into suit lands or from disturbing the plaintiffs possession in respect of the suit property, and further restraining the defendant from interfering with the agricultural activity of the plaintiff by entering forcibly into the land. In the aforesaid suit the plaintiff also filed an application Exh. 5 for an interim injunction against the defendant in terms of the relief of permanent prohibitory injunction referred to hereinabove.

5. The trial Court, after hearing the parties, rejected the application by refusing to grant injunction. The plaintiff, therefore, preferred an appeal before the Assistant Judge, Navasari being Misc. Civil Appeal No. 68 of 1993, which, after hearing the parties, was dismissed. The original plaintiff has, therefore, preferred the present revision challenging the aforesaid two orders.

6. Before entering into a discussion on the merits of the respective cases put up by the plaintiff and the defendant, I may first deal with the preliminary contention of the respondent-defendant so far as the scope of the present revision is concerned. Learned Counsel for the respondent-defendant has strenuously contended that the High Court's power to interfere in a revision u/s 115 CPC is extremely limited, and the High Court can only interfere where the impugned judgments are found to be arbitrary, capricious and/or based on no evidence whatsoever or contain such a patent illegality which would amount to a perversity in law. Learned Counsel for the respondent has also sought to place reliance upon the case of The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, . There cannot be any controversy as regards the proposition laid down by the Supreme Court in the said decision in the context of the contention raised by the learned Counsel for the respondent. However, on the facts and circumstances of the case, as discussed hereinafter, this proposition would not come in the way of the

petitioner-plaintiff.

7. Before proceeding to discuss the actual merits of the impugned orders, it would be relevant to examine the pleadings of the parties in order that the impugned decisions can be examined in the correct perspective.

8. The plaintiffs case specifically pleaded in the plaint as also in the injunction application is, firstly that he has acquired legal title to properties in question by virtue of the registered sale deeds (in respect of block Nos. 38, 39 and 40) and by virtue of the agreement of sale with the Kabja receipt in respect of block No. 37, and that he has acquired such title in respect of the suit lands although they are "fragments" inasmuch as Sections 7 and 9 of the said Act would not come in his way. According to the plaintiff the bar against transfer of "fragment" would not operate against him inasmuch as he is an agriculturist and already the holder of a "fragment", that the "fragments" purchased by him are contiguous to the "fragment" already held by him, and that therefore, such sales are permissible. It is on the basis of this factual plea that the plaintiff sought for a declaration of title in his favour.

9. The plaintiff has also sought a permanent prohibitory injunction against the defendant seeking to restrain the defendant from trespassing upon the property in possession of the plaintiff, and restraining the defendant from interfering with the possession of the plaintiff or his agricultural operations, etc. As against this, the defendant set up a case, firstly to the effect that the plaintiff has no title to the lands in question inasmuch as the sales in favour of the plaintiff were hit by the restrictive provisions of Sections 7 and 9 of the said Act, that the defendant was a tenant in respect of the lands in question, and secondly that he is in actual possession of the suit lands by virtue of the tenancy.

10. It is in the context of these pleadings that the Courts below have examined the material on record and have chosen to reject Exh. 5. The treatment given by the two Courts to the respective cases put up by the defendant and the plaintiff can be better appreciated, and the fundamental error in approach which has crept in, can also be appreciated by identifying the findings of fact recorded by the two Courts.

11. Firstly, both the Courts have recorded concurrent findings of fact that the defendant has failed to establish both that he is a "tenant" in respect of the land in question, and that he is in possession thereof. I do not propose to examine the reasons nor reappreciate the evidence on the basis of which such findings have been arrived at, inasmuch as both the said findings are against the defendant, which have not been challenged by him by preferring an appeal, nor by filing cross-objections in the appeal of the plaintiff. In any case, these findings recorded by the trial Court have been confirmed and approved by the lower appellate Court in the appeal filed by the plaintiff. These findings are, therefore, conclusive, so far as the present revision is concerned.

12. However, the mere fact that both the Courts have found that the defendant is

not in possession does not by itself assist the plaintiff. It is a well established principle of law that the plaintiff cannot succeed on the weakness of the defendant's case or on the failure of the defendant to make out his case. Therefore, the plaintiff is required to substantiate the case sought to be made out by him.

13. That takes me to the dual question of the title of the plaintiff to the lands in question and to the possession of the plaintiff in respect of these lands. Unfortunately, it appears that both the Courts below have either misunderstood the pleadings or have failed to appreciate the same in the true and correct perspective, and/or have failed to appreciate the facts established on the record of the case in the correct perspective by due application of law. In other words, both the Courts below have completely misunderstood the law applicable to the facts established on the record of the case.

14. I may first discuss the question of title of the plaintiff in respect of the suit lands. The plaintiff, no doubt, has come to the Court pleading title to the suit lands. The plaintiff has clearly set out the facts and circumstances under which, according to him, he acquired good and legal title, inspite of the restrictive provisions of Sections 7 and 9 of the said Act. Both the Courts below have examined the plaintiffs case in the context of his pleadings and averments in respect of the title, but have failed to examine the plaintiffs case as a person in possession, de hors the title.

15. This confusion has occurred simply because both the Courts have directly involved themselves in examining the provisions of the Fragmentation Act, and have chosen to interpret the same on the facts pleaded and averred by the plaintiff in so far as the sale transactions are concerned. In this context, both the Courts failed to note that in deciding the question as to whether the plaintiff had acquired good title to the lands in question in view of the relevant provisions of the Fragmentation Act, the Court was in fact and in substance assuming jurisdiction to examine, determine, and pronounce upon those facts and circumstances which it had no jurisdiction to do. What both the Courts did was to interpret the transactions in the light of Sections 7 and 9 of the said Act, completely overlooking the provisions of Sections 36A and 36B of the said Act. The said provisions read as under:

36A. Bar of Jurisdiction. - (1) No Civil Court or Mamlatdar's Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.

(2) No order of the State Government or any such officer or authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdar's Court.

36B. Suits involving issues required to be decided under this Act. - (1) If any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to

settle, decide or deal with such issues under this Act (hereinafter referred to as the "competent authority") the Civil Court, or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination.

(2) On receipt of such reference from the Civil Court or Mamlatdar's Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act, and shall communicate its decision to the Civil Court or Mamlatdar's Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Thus, both the Courts overlooked the fact that the Civil Court had no jurisdiction to enter this arena at all. The consequence of this fundamental error is that both the Courts below could not have pronounced upon the title claimed by the plaintiff, and consequently could not have pronounced upon the legality of the possession held by the plaintiff.

16. However, this leaves the factual question as to the actual possession open. As already found by both the Courts below and discussed hereinabove, the defendant has failed to prove that he is a tenant, and has also failed to prove that he is in possession. At this stage, it may be noted that although the plaintiff's case is that he is in actual possession, this has been strongly disputed by the respondent-defendant. Both the Courts have recorded a finding of fact that although the plaintiff is in actual and physical possession, such possession is not legal. In other words, both the Courts have found that so far as physical and actual possession is concerned, the same is with the plaintiff.

17. However, with a view to deal with the contentions raised by the learned Counsel for the respondent-defendant, I may briefly discuss how this finding has been arrived at. The lower appellate Court has discussed in para 18 of its judgment as to how the fact situation has changed when the sale deed Mark 3/14 was executed in favour of the plaintiff, which, although does not speak of transfer of actual possession to the plaintiff, is supported by Kabja receipt Mark 3/15. Not only does this Kabja receipt indicate that the plaintiff was placed in possession by the vendor, but the defendant is also a signatory to both Marks 3/14 and 3/15. Both the Courts have discussed at length the implication of this fact, and have correctly found that if the defendant was a tenant and the person in possession of these lands, he would not have become a signatory to either the Kachha sale deed Mark 3/14, nor the Kabja receipt Mark 3/15. Now this situation pertains to block No. 37. So far as block No. 36, 38 to 40 are concerned, the plaintiff holds the lands by virtue of the sale deeds and the recitals therein in his favour, and by virtue of the pencil entries made in the revenue records. What must be appreciated and what both the Courts have failed to appreciate, is that the fact that the pencil entries in the revenue records is the subject-matter of an on-going litigation between the parties which is not yet concluded in favour of either of the parties, affects only the legality of the transaction, but does not affect the possession of the plaintiff given under the sale deeds.

18. It must also be noted that so far as specific findings on questions of fact are concerned, both the Courts have found only that the defendant is not in possession, that the possession of the plaintiff is not legal, but there is no specific finding that the plaintiff is not in actual possession. In this context, it must also be appreciated that when both the Courts discussed the evidentiary value of the pencil entries in the revenue records, and having found that the same are the subject-matter of an on-going litigation between the parties, the conclusion which could have been drawn therefrom is only that such documents from the revenue records would not establish the ownership and/or "occupancy" (within the meaning of revenue law), but cannot lead to the conclusion that the same do not at least on a prima facie basis establish possession. In any case, on this state of evidence on record, once it is found concurrently by both the Courts, firstly that the defendant is not in possession, and secondly that no other person claims possession, nor does the defendant claim that the possession is held by any person other than himself, it must be found that the plaintiff is in possession of the lands in question.

19. Thus, on the basis of the aforesaid established facts, according to the learned Counsel for the petitioner-plaintiff, the legality or otherwise of the plaintiffs possession is of no consequence. In this context, learned Counsel for the petitioner submitted that it is a well established principle of law that the person in possession of property is entitled to the protection of the Court for safeguarding his possession, even if he were only a trespasser, against the entire world and he cannot be dispossessed except by due process of law. It was further submitted that by virtue of the well established doctrine of "possessory title", actual possession is a better title than that of all others except against the true owner. There cannot be any serious controversy as regards this legal position. However, since the learned Counsel for the respondent has seriously contested this issue, I may briefly examine the relevant law on the subject. The doctrine of "possessory title" arises from the legal maxim "Adversus extraneous vitiose possessio prodesse solet". This doctrine and its applicability to various situations has been discussed by the Supreme Court in the case of Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, . The facts of that case have been discussed in para 2 of the said decision. While discussing the scope of Section 110 of the Indian Evidence Act in para 15 of the said decision, the Supreme Court dealt with the contention based upon the principle that possession follows title, and that after expiry of six months the plaintiff must prove title. The contention was to the effect that prima facie possession may raise a presumption of title, but the presumption can hardly arise on the facts of the case. When the facts disclose no title on either party, possession alone decides. The Supreme Court found on the facts of the case that Section 110 of the Evidence Act would not be material, since neither party had title. On such facts, the consequential contention to the effect that the suit based on bare possession could not be maintained after six months and that the Society has a right to plead *jus tertii* was not upheld. In this case, the Supreme Court found

that the first contention must be held to be unsubstantial and the second contention equally unfounded.

19.1 In this context, the Supreme Court referred to a summary, by the learned Dr. Salmond on Torts (13th Edition) at page 172, which reads as under:

The mere de facto and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is, therefore, sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words, no defendant in an action of trespass can plead to *jus tertii* - the right of possession outstanding in some third person - as against the fact of possession in the plaintiff.

In this context after discussing the various decisions on the subject the Supreme Court quoted with approval from the decision in the case of *Judicial Committee in Perry v. Clissold* 1907 AC 73. While reaffirming the principle, it observed as under:

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title.

The Supreme Court thereafter discussed various other decisions and ultimately came to the conclusion that the view expressed and principle laid down in the case of *Judicial Committee in Perry v. Clissold* (*supra*), must be accepted, and may be taken to be clarificatory of the law in India. To summarise, once it is found that the plaintiff is in possession, the legality of his possession is not relevant as except the true owner of the land and even if the person in actual possession did not hold title and was perhaps only a trespasser, he would be entitled to protect his possession by virtue of the doctrine of "possessory title", as against all except the true owner.

19.2 The aforesaid decision has been followed and applied by the Calcutta High Court in the case of *Biswanath Bandopadhyay Vs. Sm. Purnamoni Dassi and Another*, , although the facts of the case were slightly different. In the said decision the suit was for an injunction against a wrong-doer and not against the defendant as an agent of the rightful owner or the tenant. The relief claimed was for restraining such defendant as a trespasser from interfering with the plaintiffs prior possession. It was held that such a suit was maintainable under the Specific Relief Act and the plaintiffs were held entitled to the injunction against the defendant, since the defendant had no title, since his title was not perfected by adverse possession. In other words, the plaintiff was entitled to injunction

restraining the defendant from interfering with the plaintiffs possession, although the plaintiff was found merely to be in possession, and since the defendant did not have better title.

20. On the facts of the present case, it is found that the defendant has failed to show possession of the disputed property, and has also failed to show a better right to possession (on the ground of tenancy). Thus, even if the plaintiff fails to establish prima facie title to the suit property which is claimed by him, that by itself would not disentitle him to the relief of an interim prohibitory injunction restraining the defendant from interfering with the plaintiffs possession.

21. In view of the abovesaid position of law, it is obvious that the Courts below completely misdirected themselves in focusing their attention and basing their decision entirely upon the legality of the plaintiffs possession, even though the defendant was found neither to be in possession nor to have better title than the plaintiff. On these facts, it is obvious that the Courts have completely lost sight or have failed to appreciate the legal position that the plaintiff would be entitled to a relief against threatened dispossession by the defendant merely on the basis of the possession held by the plaintiff, irrespective of whether the plaintiff had title to the property or not. Even otherwise, both the Courts below lost sight of the fact that the legality of plaintiffs possession is quite different from the legal title of the plaintiff to the property. It may well be that ultimately the plaintiff may fail to establish his claim to legal title to the property, or may even fail to establish a prima facie case at the stage of injunction application that he holds possession by virtue of legal title, nevertheless as long as the defendant cannot show better title than the plaintiff, the plaintiff would be entitled to an injunction against the threatened dispossession.

22. In the premises aforesaid the orders impugned in the present revision clearly suffer from a patent illegality, which has resulted in miscarriage of justice. In view of the fact that the defendant is not in possession of the property whereas the plaintiff is, if this Court permitted the impugned orders to stand, it would occasion a failure of justice and cause irreparable injury to the plaintiff, and the case would fall squarely within Clause (b) of the proviso to Sub-section (1) of Section 115 CPC.

23. The impugned orders must, therefore, be quashed and set aside and the revision must be allowed. Accordingly the impugned orders are quashed and set aside. The interim relief granted by this Court by order dated 4th April 1994 in terms of para 5(b) of the memo of the revision shall continue to operate for the duration of the suit.

Rule is made absolute accordingly with no order as to costs.