
(2019) 02 BOM CK 0107
In the Bombay High Court
Case No : Appeal From Order No. 61 Of 2015

Milagrina Pereira e Xavier And Ors

APPELLANT

Vs

Antonio Walter Do Rosario Colaco alias Walter Collaco And
Ors

RESPONDENT

Date of Decision : 21-02-2019

Acts Referred:

Citation : (2019) 02 BOM CK 0107

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : J. Coelho Pereira, Somnath Karpe, Sudesh Usgaonkar, Rosette Pereira

Final Decision : Disposed Off

Judgement

C. V. Bhadang, J.

1. By this appeal, the appellants, original plaintiffs are challenging the order dated 29.10.2015, passed by the learned Trial Court, thereby rejecting the application for temporary injunction filed by the appellants.

2. The appellants have filed a suit against the respondents for permanent and mandatory injunction alongwith consequential reliefs. A plot of land, better known as 'Vala', situated at Calcondem ward, Navelim village, within the jurisdiction of Margao Municipal Council, surveyed under Chalta No. 190 of P.T. Sheet No. 260 (described under land registration nos. 39035 and 1092), admeasuring 1202 square metres happens to be the subject matter of dispute.

3. According to the appellants, somewhere in the year 1951, the husband of the appellant no. 1 i.e. late Mr. Santana Xavier had taken the suit plot on lease from the landlord, Maria Piedade Benedita Helena Do Rosario Colaco, who is the mother/mother-in-law of the respondent nos. 1 to 4. The suit plot was obtained on lease for a period of five years on payment of annual rent of Rs.276/- for the purposes of a timber depot. Santana Xavier was permitted to erect a shed in the suit property and install a saw mill thereon. It was contended that the lease was

extended for a further period of 10 years and thereafter, further renewed from 26.04.1967 under an agreement dated 05.07.1967. The annual rent was increased from Rs.276/- to Rs.540/- for a period of three years starting from 01.01.1967.

4. For the limited purpose of the disposal of the present appeal, it would not be necessary to set out the facts in details. Suffice it to mention that according to the appellants, somewhere in April, 2015, they learnt that the existing saw mill machinery has been removed, the structure has been demolished and respondent nos. 5(a) to 5(f) and 6 have started constructing a building/hotel which was in progress, which prompted the appellants to file the suit as aforesaid.

5. The respondent nos. 5(a) to 5(f) and 6 are claiming to be the purchasers of the suit property under a registered sale deed dated 15.04.2013, have constructed a building on the suit plot for running a hotel.

6. The appellants sought temporary injunction against the respondents restraining them from interfering with or raising any construction in the suit property.

7. The learned Trial Court by the impugned order has dismissed the said application. Hence, this appeal.

8. I have heard Mr. Coelho Pereira, the learned Senior Counsel for the appellants and Mr. Usgaonkar, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record.

9. The learned Trial Court has found that there is no reference to the land registration no. 1092 in the rent receipts. The learned Trial Court has found that there was no dispute that there existed a temporary shed in suit property bearing Chalta No. 190 of P.T. Sheet No. 260. The learned Trial Court has further found that although, the lease agreement categorically mentioned that Santana Xavier, was permitted to erect a timber depot, it was however, without causing damage to the plantation of fruit bearing trees, which are existing in the land. Thus, the learned Trial Court came to the conclusion that the entire property was not leased to Santana Xavier. Thus, according to the learned Trial Court, even assuming that the appellants are tenants (only of land registration no. 39035), the appellants cannot sustain a claim of injunction, against the respondents on the premise that the respondents have under taken construction in the entire property. Prima facie, the learned Trial Court has found that the appellants have failed to show as to what extent the encroachment has been committed by the respondents in the suit property.

10. Be that as it may, by interim order dated 07.12.2015, this Court had directed the respondents not to create any third party interest in the suit property and further, had restrained them not to occupy the building, without prior permission of this Court.

11. Miscellaneous Civil Application No. 975/2018 is filed by the respondent nos.

5(a) to 5(f) and 6 for grant of permission to occupy the building, in as much as the construction is complete and they have obtained an occupancy certificate on 05.11.2018 from the Margao Municipal Council.

12. On hearing the learned Counsel for the parties and on perusal of record, it does appear that there is a triable issue involved in the suit. The learned Counsel for the parties submit that the suit is ripe for hearing. There are certain lease agreements, which are produced on record and the question is whether, the lease pertains to the entire land surveyed under Chalta No. 190 of P.T. Sheet No. 260 (comprising of land registration no. 39035 and 1092) or whether, the lease was only in respect of land registration no. 39035. The Trial Court has also noticed that the existence of the structure in the suit property is not disputed. Considering the overall circumstances and in order to balance equities, I find that the order restraining the respondents not to create any third party interest over the suit property can be continued.

13. Mr. Usgoankar, the learned Counsel for the respondents, on instructions and in all fairness submitted that respondent nos. 5(a) to 5(f) and 6 have no objection for the said order being continued.

14. Insofar as the permission to occupy the building is concerned, the construction is complete and the occupancy certificate dated 05.11.2018 is produced on record. Thus, the respondent nos. 5(a) to 5(f) and 6 (applicants in MCA NO. 975/5018) can be permitted to occupy the building, subject to deposit of Rs.5 lakhs before the Trial Court, which will take care of the potential claim of the appellants, towards damages as made in the suit.

15. At this stage, Mr. Coelho Pereira, the learned Senior Counsel for the appellants states that the appellants intend to file an application for amendment of the plaint before the Trial Court.

16. In the result, the Appeal is disposed of in the following terms:

(i) The respondent nos. 5(a) to 5(f) and 6, their agents or anybody on their behalf are hereby restrained from alienating the suit property or creating third party interest in the same, during the pendency of the suit.

(ii) The respondent nos. 5(a) to 5(f) and 6 shall deposit an amount of Rs. 5 lakhs before the learned Trial Court, towards the tentative damages, as claimed on behalf of the appellants, within three weeks from today.

(iii) The respondent nos. 5(a) to 5(f) and 6 are permitted to occupy the premises, subject to obtaining of all required permissions from the local authority and further subject to deposit of the amount as aforesaid.

(iv) This shall be subject to the rival contentions of the parties, as raised in the suit and without prejudice to their rights.

(v) The respondent nos. 5(a) to 5(f) and 6 shall not claim any equity on the basis of the present order.

(vi) The learned Trial Court shall proceed to hear the suit and decide the same as expeditiously as possible and preferably, within a period of one year from the receipt hereof.

(vii) The appellants may file an application for amendment of the plaint. However, if such an application is filed, the learned Trial Court shall decide the same on its own merits and in accordance with law.

(viii) The appeal is disposed of in the aforesaid terms, with no order as to costs.