

(2011) 09 BOM CK 0180
In the Bombay High Court
Case No : Writ Petition No. 305 of 2011

Mr. Mahadev Parsekar, (Since expired) Through His Legal Heirs (Mr. Pritam Mahadev Parsekar and Others) and Mrs. Champa M. Parsekar, Service, Mrs. Ramila Mahadev Parsekar and Mr. Mahesh Mahadev Parsekar

APPELLANT

Vs

Eduardo Simao D"Costa @ Edward S. D"Costa and His Wife and Mrs. Priscila D"Costa

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2011) 09 BOM CK 0180

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : D. Panam, for the Appellant; Sudin Usgaonkar, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri D. Pangam, learned Counsel appearing for the petitioners and Shri S. Usgaonkar, learned Counsel appearing for the respondents. The above writ petition challenges the order passed by the learned Courts below whereby the application for temporary injunction filed by the respondents in Regular Civil Suit No.27/2006 was allowed and the petitioners, inter-alia, were restrained from interfering, trespassing, intimidating or doing any other act of trespass or acts of dispossession of the respondents of whatsoever nature in the suit property.

2. Shri D. Pangam, learned Counsel appearing for the petitioners has essentially assailed the impugned judgment on the ground that there is no definite finding arrived at by the Courts below to the effect that the respondents were in possession of the suit property. The learned Counsel has further pointed out that the petitioners are in possession of the suit property and according to him such possession cannot be disturbed at this stage on the basis of the impugned order.

The learned Counsel further pointed out that there is a house which is existing in the suit property which according to him was in occupation of the petitioners. The learned Counsel has taken me through the judgment passed by the Courts below and pointed out that the learned Courts have erroneously appreciated the evidence on record and have come to an erroneous conclusion that the respondents are entitled for the temporary injunction as prayed for in the suit. The learned Counsel, as such, pointed out that the impugned order deserves to be quashed and set aside. The learned Counsel further pointed out that in case the impugned order is allowed to stand, the respondents shall have a free hand to change the nature of the suit property and create third party right therein to the detriment of the interest of the petitioners in the suit property.

3. On the other hand, Shri S. Usgaonkar, learned Counsel appearing for the respondents has supported the impugned judgment. The learned Counsel has pointed out that the Courts below have given categorical finding that the respondents are in possession of the suit property. The learned Counsel further submitted that such findings have been arrived at not only on the basis of the affidavits filed by the respondents, but also considering the documentary evidence produced which inter alia, included a receipt-cum-agreement dated 19/09/1965, executed by the owner of the suit property. Apart from that, the learned Counsel has pointed out that he has produced the judicial orders which establish that the respondents were protecting their possession over the suit property. All such documentary evidence has been duly considered by the Courts below to come to the conclusion that the respondents are in possession of the suit property. The learned Counsel further pointed out that there is no jurisdictional error committed by the Courts below while disposing of the application for temporary injunction and, as such, no interference is called for by this Court in the impugned orders in exercise of its jurisdiction under Article 227 of the Constitution of India.

4. Having heard the learned Counsel for both the parties and on perusal of the records, I find that the grievance of the petitioners is essentially that the Courts below have not given categorical finding that the respondents were in possession of the suit portion of the property. But however, on perusal of the impugned judgment and specially the judgment of the Appellate Court it has been held therein after appreciating the evidence on record that the respondents have succeeded to prove that they are in possession of the suit property. The learned Counsel appearing for the petitioners was unable to point out any piece of evidence produced by the petitioners which has not been considered by the Courts below to arrive at such findings. While considering the material on record, the learned trial Judge while passing the order dated 28/11/2007 has found that the petitioners who claimed to have produced the sketch of the area in their possession have failed to produce such sketch but only the survey plan in respect of the entire Survey No.91/0. The learned Judge has also found that there was a shack in the suit portion of the property which stands in the name of the respondents. The said finding has been arrived at on the basis of the house

tax receipts and the NOC's issued by the Village Panchayat. The learned Judge has also noted that the petitioners have failed to establish any act of possession in respect of the suit portion of the property. The learned Additional District Judge has considered the evidence on record and has come to a categorical finding that the respondents are in possession of the suit property. The said findings by the learned Appellate Court has been arrived at after considering all the documents adduced by both the parties. The respondents have also produced a document dated 19/09/1965 which is stated to be executed by the owner of the property establishing inter alia that an area of 1000 square metres was given to the respondent no.1 on account of the fact that he was cultivating nachni, paddy and other cereals therein. Considering all the aforesaid evidence, I find that Courts below have given a categorical finding that the respondents have prima facie established that they are in possession of the suit portion of the property.

5. Apart from that it is to be noted that the petitioners have not established any ownership rights to the suit property. No document or any piece of evidence has been produced by the petitioners to establish that they have any title to the suit portion of the property. Though it is alleged by the petitioners that there was an oral arrangement whereby the petitioners were permitted to put up a construction in the suit property, but however, no material has been adduced to that effect by the petitioners.

6. Dealing with the apprehension of the petitioners that the respondents may change the nature of the suit property and/or create third party right, Shri Usgaonkar, learned Counsel appearing for the respondents, upon instructions, has fairly stated that the respondents will not create any third party right nor change the nature of the suit property during the pendency of the suit. The said statement is accepted. As such, the apprehension of the learned Counsel appearing for the petitioners to that effect would not survive.

7. The Apex Court in the judgment reported in B.K. Muniraju Vs. State of Karnataka and Others, , has held at para 22 thus:

22. It is settled law that a writ of certiorari can only be issued in exercise of extraordinary jurisdiction which is different from appellate jurisdiction. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals or authorities in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to a finding of fact recorded by an inferior tribunal or authority, a writ of certiorari can be issued only if in recording such a finding, the tribunal/authority has acted on evidence which is legally inadmissible, or has refused to admit an admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is needless to mention that a pure error of fact, however grave, cannot be corrected by a writ.

8. Taking note of the said judgment of the Apex Court, I find that there is no jurisdictional error committed by the Courts below in granting the application for temporary injunction in favour of the respondents. Learned Courts below have considered the material on record and have arrived at prima facie findings in favour of the respondents. The learned Counsel appearing for the petitioners was unable to point out that any such finding have been arrived at on the basis of any inadmissible evidence and/or any piece of evidence produced by the petitioners has not been considered. Needless to say that the prima facie finding arrived at by the Courts below will not influence the learned Trial Judge while finally deciding the suit. Considering the rival contentions, I find it appropriate that in the interest of justice the suit filed by the respondents be disposed of expeditiously and, as such, the learned trial Judge is directed to decide the suit filed by the respondents as expeditiously as possible, preferably on or before 31/12/2012 in accordance with law.

9. Subject to above, I find no merit in the above petition which stands dismissed. At this stage, Shri D. Pangam, the learned Counsel appearing for the petitioners seeks stay of the order passed today for a period of four weeks as according to him the stay of the impugned order passed by the Courts below was operating up to this date. Shri Sudin Usgaonkar, learned Counsel appearing for the respondents opposes the said prayer. Considering that an interim order staying the orders passed by the Courts below was in force during the pendency of the above petition, the order passed today is stayed for a period of four weeks.