

(2019) 08 BOM CK 0087

In the Bombay High Court

Case No : Appeal Against Order (Ao) No. 18 Of 2019

Nagar Parishad

APPELLANT

Vs

Cotton Market Dharamshala Trust And Ors

RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Bombay Revenue Jurisdiction Act, 1876 — Section 11
Electricity Act, 2003 — Section 67(3)
Code Of Civil Procedure, 1908 — Order 2 Rule 2, Order 39 Rule 1, Order 39 Rule 2
Constitution Of India, 1950 — Article 64, 65

Citation : (2019) 08 BOM CK 0087

Hon'ble Judges : M.G. Giratkar, J

Bench : Single Bench

Advocate : M.M. Agnihotri, M.I. Dhattrak, Masood Shareef, Anand Parchure, O.R. Deshpande, S.V. Kolhi

Final Decision : Allowed

Judgement

1. Heard. Admit. Heard finally with the consent of learned Counsel appearing on behalf of the respective parties.

2. This is an appeal filed by Nagar Parishad, Katol (original defendant No.4) against the order dated 30th April, 2019 passed below Exhs.5 and 40 by the learned Joint Civil Judge, Junior Division, Nagpur in Special Civil Suit No. 886 of 2017, whereby application filed by the plaintiffs (respondents) for temporary injunction under Order 39 Rule 1 and 2 came to be allowed. (The parties in the present appeal hereinafter referred as plaintiffs and defendant for the sake of brevity).

3. The plaintiffs have filed Special Civil Suit No. 886 of 2017. The plaintiff No.1 claims to be the owner of Khasra No. 589 (old) admeasuring 1.40 acres (Final Plot No.399, area 0.74 acres as per Town Planning Scheme, Katol No.1)(area as per City Survey 1862.1 sq. meters), together with construction thereon bearing City Survey No.3362, Sheet No.27 of Mouza Katol, situated at Katol. The said

suit property is owned by plaintiff No.1. The plaintiff No.1 is a Trust and the absolute owner and occupier of the suit property and is in occupation and possession of the suit property since more than century. The said Trust is exercising its absolute rights over the said suit property without any let, hindrance or obstruction from any quarter. The said property is recorded as Trust property in the record of Joint Charity Commissioner. The structure standing over the suit property indicates the age of structure which is around century.

4. The construction of the structure over the suit property belonging to plaintiff No.1/Trust was completed in the year 1938. The plaintiff No.1/Dharamshala Trust was formed in the year 1912-13 and the suit property admeasuring 1.40 acres was allotted to plaintiff No.1 under the Berar Cotton and Green Market Act, 1897 for establishment of Cotton Market Dharamshala. In the Bandobast Khasra of the year 1912-13, the said land bearing Khasra No.589 is shown as land of Cotton Market Dharmashala Trust. The said Trust was established for the purpose of providing facility to the Cotton sellers who were coming from outside and were visiting the Cotton Market at Katol for sale of cotton and also for providing the basic lodging and boarding facility to the outside Cotton Sellers so also for their security purpose.

5. In the year 1921, a Dharmada Funds was formed and from the said Funds, Dharamshala Trust was formed. The construction of the building of the Trust which is in existence as on date was completed in the year 1935-38. The Trust was registered as society under the erstwhile Madhya Pradesh Act. In the year 1950-51, the suit property was shown under the ownership of the Trust.

6. In the year 1971-72 with the formation of the City Survey department, the measurement of the land in Katol was carried out and maps were accordingly prepared and city survey numbers were assigned. During the course of the measurement by the City Survey Department the area of the aforesaid land was recorded as 1862.1 sq. meters only. The said land is shown as Government Land (Abadi). Incidentally, the said entry in the City Survey records went unnoticed. The plaintiff No.1 after becoming aware about the said erroneous entries in the revenue record has challenged the same before the Revenue authorities and the matter is pending.

7. In the Enquiry Register of the year 1971-72, the name of Dharamshala is recorded. In the year 1978, the development plan with respect to Katol Municipal Council came to be sanctioned. In the said development plan, the suit property is shown as "Sarai" (Dharamshala). This also shows that the suit property all along had been acknowledged as Dharamshala property and the plaintiff No.1 is shown as the owner of the suit property. In the municipal record, the suit property is shown as owned by plaintiff No.1.

8. In the year 2002-03, the Nagar Parishad had issued notice for demolition of the Trust building. Civil Suit was filed which was subsequently withdrawn with liberty in view of assurances given by Nagar Parishad to plaintiff No.1/Trust. The

other plaintiffs are the tenants of plaintiff No.1. The plaintiffs were shocked and surprised upon receipt of notice dated 20th June, 2017 issued by defendant No.3, wherein it was alleged that the structure over the suit property is allegedly in dilapidated condition and that the same is required to be transferred in favour of Nagar Parishad. Accordingly, the plaintiffs went to the office of Tahsildar and submitted all documents together with their written submission.

9. The plaintiffs have demonstrated that the defendants have no semblance of right with respect to the suit property inasmuch as the plaintiff No.1 is the absolute and exclusive owner of the suit property and is in possession of the same since more than a century. The plaintiffs are legally and lawfully occupying the suit property and the defendants cannot claim any right over the suit property nor could disturb the possession of the plaintiffs over the suit property. After issuance of the statutory notice dated 09.08.2017, the suit was filed on or about 08.11.2017. During the pendency of suit, the plaintiffs had also issued a notice dated 08.12.2017 to defendant No.4 whereby it was proposed to add defendant No.4 in the suit. From the contents of written statement filed by defendant No.4, the plaintiffs learnt that by order dated 31.10.2017, the Collector, Nagpur had allotted the suit property in favour of defendant No.4. Therefore, prayed for declaration of the title of plaintiffs and also for injunction against the defendants.

10. The defendant/Municipal Council has filed written statement and denied the contention of the plaintiff. It is submitted by the side of defendant that plaintiff No.1 is not the owner of the suit property. The suit property is owned by Municipal Council, Katol as per the order of Collector, dated 31st October, 2017. There is heavy rush of motor vehicles in the market area. Therefore, the Municipal Council, Katol has submitted a plan for construction of parking plaza on the suit property. The plan is sanctioned by the government. Lastly, it is submitted that looking to the urgent need of the public at large, injunction granted by the Civil Judge, Senior Division, Nagpur is liable to be quashed and set aside.

11. The trial Court after hearing both the parties, passed the impugned order holding that the plaintiffs are in possession since long and, therefore, they are entitled for injunction. By impugned order, the defendants are restrained from disturbing the possession of plaintiffs over the suit property on the basis of the order passed by the Collector dated 31st October, 2017. Hence, the present appeal.

12. Heard Shri M.M. Agnihotri, learned Counsel appearing on behalf of the appellant, Shri Masood Shareef, learned Counsel appearing on behalf of respondent Nos.1 to 23 and Smt. S.V. Kolhe, learned Assistant Government Pleader appearing on behalf of respondent Nos.24 to 26.

13. Shri Agnihotri, learned Counsel for the appellant has pointed out the documents filed in the suit and submitted that not a single document is filed on

record to show the ownership of plaintiff No.1. The long standing possession cannot be a right to the plaintiff to protect the possession. He has further submitted that by order dated 31st October, 2017, the Collector, Nagpur has allotted the suit land/ property in favour of defendant Nos.3 and 4. The amount of valuation of the suit property of Rs.61,44,930/- is already deposited by the Municipal Council, Katol in the Treasury. As per the development plan, the suit property is shown for public purpose i.e. for the construction of commercial complex and parking. There is no sufficient place for parking for the benefit of public interest. The development plan is sanctioned. The defendant/Municipal Council, Katol is the absolute owner. The suit property is granted by the Collector. The value of the suit land is also deposited. Therefore, plaintiff No.1 has no any title over the suit land.

14. It is submitted by the defendant/Municipal Council that the plaintiff No.1 had filed Regular Civil Suit No. 66 of 2002 for declaration and permanent injunction with a prayer to declare possession of plaintiff No.1 over the suit property and injunction against the Municipal Council, Katol. The temporary injunction was sought in the said suit by an application below Exh.5. The said application was decided by the learned Civil Judge, Junior Division, Katol as per order dated 16th February, 2004. The said application (Exh.5) came to be rejected by recording a specific finding that the land is of government and the plaintiffs therein i.e. plaintiff No.1 does not have any right over the suit property. The said order was carried in appeal by plaintiff No.1 before the District Judge, Nagpur in Appeal No. 102 of 2004. As per the judgment dated 21st April, 2004, learned District Judge, Nagpur had dismissed the appeal.

15. The plaintiff No.1 when realized that he would not be entitled for any relief, then he had moved an application (Exh.79) with a clear cut admission that the land belongs to the State Government and, therefore, sought for permission to withdraw the suit with liberty to file fresh suit. On perusal of the pleadings of application (Exh.79), it is clearly demonstrated that plaintiff No.1 had admitted the findings recorded by the trial Court and the appellate Court which rejecting the application (Exh.5). Therefore, the plaintiff cannot take contrary stand and plead against own pleadings. Learned trial Court allowed the said application (Exh.79) to the extent of permitting plaintiff No.1 to withdraw the suit only without any liberty to file fresh suit on the same cause of action. Therefore, again the same relief cannot be sought by way of fresh suit as the same is barred by law and not permissible as per Order 2 Rule 2 of the Code of Civil Procedure.

16. It is submitted that the defendant/Municipal Council, Katol is the owner of the suit property. There is eminent need to construct the parking plaza. Looking to the public interest, the trial Court should not have granted injunction in favour of the plaintiffs.

17. Shri Agnihotri, learned Counsel for the appellant has submitted that the impugned order passed by the learned Civil Judge, Senior Division, Nagpur is

illegal and, therefore, liable to be quashed and set aside.

18. Shri Shareef, learned Counsel for the respondents has submitted that the documents filed on record show that the plaintiffs are in possession since long. They are in settled possession. The suit can be based on possessory title. He has further submitted that now the law is changed. By now, possession can be used as a sword. He has also pointed out recent decision of the Hon'ble Apex Court in the case of Ravinder Kaur Grewal and others .v. Manjit Kaur and others (Civil Appeal No. 7764 of 2014, dated 07.08.2019). Learned Counsel has submitted that this Court cannot set aside the order of trial Court. In support of his submission, he has pointed out the decision of the Apex Court in the case of M/s Gujarat Bottling Co. Ltd. and others .v. Coca Cola Company and others (reported in AIR 1995 SC, 2372) and the decision of this Court in the case of Ganesh D. Daivajna .v. Prakash S. Salkar (reported in 2000(3) Mh.L.J., 347).

19. The contention of plaintiff No.1 that the suit property is owned and possessed by plaintiff/Trust from the year 1912-13 is without any document. The plaintiffs have not filed any document to show their ownership. One document of revenue record of the year 1912-13 shows that plot No.589, area 1.40 acres is owned by Cotton Market Malik Notified Area Committee, Katol. This entry does not show that the plaintiff is the owner of the suit property. The suit property though shown in the record of Charity Commissioner owned by plaintiff No.1, no document of ownership is produced before the Court or before the Charity Commissioner to show the ownership of plaintiff No.1.

20. It is contended by other plaintiffs that they are in possession of suit premises as tenants since last 40-50 years. But the memorandum of association submitted to the Charity Commissioner shows that the governing body may lease any property for a period not exceeding five years and, therefore, the tenancy agreement, if any by plaintiff No.1 for more than five years, is in contravention of memorandum of association.

21. Shri Shareef, learned Counsel for the respondents has pointed out the assessment list prepared by the Municipal Council, Katol in which Dharamshala is shown. The documents prepared for the recovery of taxes do not confer any title in favour of plaintiff No.1.

22. Shri Agnihotri, learned Counsel for the appellant has pointed out the judgment of the Hon'ble Supreme Court in the case of State of H.P. .v. Keshav Ram and others (reported in 1996 (11) SCC, 257), in which, it is held that, "only an entry in the revenue papers by no stretch of imagination can form basis for declaration of title in favour of plaintiff/respondent. Hence, Courts below committed serious error of law in declaring plaintiffs' title merely on the basis of entries in the Revenue papers."

23. Shri Agnihotri, learned Counsel for the appellant has pointed out the decision of this Court in the case of Municipal Council, Pusad .v. Kundanlal Mohanlal Jaiswal and others (reported in 2007(3) All MR, 86), in which, it is held that, "if

final relief itself cannot be granted on such plea, it is apparent that no interim relief also can be sustained by it. Thus apart from long possession, such person has to establish some legal right in his favour to enable him to obtain temporary injunction during pendency of suit. Mere act of depositing certain amount as monthly rent cannot clothe him with status as lessee or tenant." The entries in the revenue record do not confer any title on plaintiff No.1. The plaintiff No.1 has not filed any document to show the ownership. The assessment list prepared by Municipal Council, Katol for the purpose of recovery of taxes does not mean that plaintiff No.1 is the owner of the suit property.

24. The documents filed on record clearly show that from the year 1972 and onwards, the suit property is shown as public property (Abadi). The government was shown as the owner of the suit property. Looking to the needs of public utility, the Collector, Nagpur has granted the suit property in favour of Municipal Council, Katol vide order dated 31st October, 2017. There was no injunction order against the Collector or Municipal Council on 31st October, 2017.

25. At this stage, prima facie, the defendant/Municipal Council is the owner of suit property. The amount of valuation of Rs.61,44,930/- is already deposited by the Municipal Council, Katol to the government by challan. As per the development plan sanctioned by the government, the suit property is reserved for the construction of parking plaza.

26. There is no dispute that Regular Civil Suit No. 66 of 2002 was filed by plaintiff No.1 against the Nagar Parishad, Katol. In the said suit, prayer was for declaration of ownership and injunction against the Municipal Council. In the said suit itself in para 6 the cause of action for the suit was shown that it arises on 29th May, 2002 when the plaintiff received defendants (Municipal Council) letter claiming possession of the suit property and lastly on 20.07.2002, when the defendants served statutory notice. In the present suit also, the plaintiffs claimed declaration of ownership and injunction. In Regular Civil Suit No. 66 of 2002, application (Exh.5) was filed for injunction. The said application came to be decided by the Civil Judge, Junior Division, Katol on 16th February, 2004. The application came to be rejected. The findings in the said order show that the suit property i.e. Survey No. 589 of Katol belongs to the government. The said order was challenged by plaintiff No.1 in Miscellaneous Civil Appeal No. 102 of 2004. The said appeal came to be dismissed maintaining the findings recorded by the trial Court. After the dismissal of appeal, plaintiff No.1 moved an application (Exh.79) with a prayer to allow the plaintiffs to withdraw the suit with liberty by passing suitable order. On 02nd April, 2013, Civil Judge, Junior Division, Katol passed order below Exh.79 by allowing the application. It is specifically mentioned in the order as follows :-

"... From the perusal of application, it appears that the plaintiff has not mentioned satisfactory reason for withdrawal of the suit. Moreover, plaintiff is seeking the permission to file a fresh suit on the basis of future contingency. Considering the over all aspects, the plaintiff is hereby permitted to withdraw the

suit only without a liberty to file fresh suit on same cause of action."

27. Though the cause of action shows in present suit is different, it appears the same cause in the civil suit where the notice of Municipal Council, Katol for demolition of suit property was challenged. In the said notice, Municipal Council, Katol claimed possession and ownership. Therefore, it appears that the present suit is in contravention of the order passed below Exh.79 in Regular Civil Suit No. 66 of 2002.

28. Shri Agnihotri, learned Counsel for the appellant has submitted that the order of Collector dated 31st October, 2017 was challenged before the Commissioner in Appeal No. 300 of 2018. By Order, dated 18th August, 2018, the said appeal came to be rejected. Thereafter, the plaintiff No.1 has not exhausted the remedy but filed Writ Petition No. 5522 of 2018. The said writ petition is also dismissed. Copy of the same is also filed on record. As per the Bombay Revenue Jurisdiction Act, 1876, particularly Section 11, no suit shall be entertained unless the plaintiff has exhausted the right of appeal.

Section 11 of the Bombay Revenue Jurisdiction Act, 1876 is reproduced as under :-

"11. Suits not to be entertained unless plaintiff has exhausted right of appeal - [Except as otherwise expressly provided in the Maharashtra Land Revenue Code, 1966, no Civil Court shall entertain] any suit [against the [Government]] on account of any act or omission of any Revenue Officer unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present."

The plaintiff No.1 has not exhausted the right of appeal under Section 11 of the Bombay Revenue Jurisdiction Act, 1876.

29. Shri Shareef, learned Counsel for the respondents has pointed out the decision of Hon'ble Apex Court in the case of Ravinder Kaur Grewal and others .v. Manjit Kaur and others (cited supra) and submitted that the plaintiff can file suit claiming possession perfected by adverse possession and the long standing adverse possession can be used as a shield and not only the sword. The Hon'ble Apex Court in para 59 has held as under :-

"We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by

another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit."

30. The proposition laid down by the Hon'ble Apex Court is not disputed by the side of appellant, but Court has to see the dispute between private party and the public at large. The Hon'ble Apex Court in the judgment of Ravinder Kaur Grewal and others .v. Manjit Kaur and others (cited supra), in para 60 has specifically held as under :-

"When we consider the law of adverse possession as has developed vis-a-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession."

31. In para 60 of the judgment, the Hon'ble Apex Court has specifically held that adverse possession cannot be claimed against the government/public body. In the present case, the Municipal Council, Katol is expected to fulfill the needs of public at large. The suit property is reserved for parking plaza in the development plan. As per the contention of Municipal Council, Katol, there is eminent need of construction of parking plaza due to heavy rush of the vehicles and, therefore, looking to the public utility, learned trial Court should not have granted injunction.

32. Shri Shareef, learned Counsel for the respondents has pointed out the decision of Apex Court in the case of M/s Gujarat Bottling Co. Ltd. .v. Coca Cola Company and others (cited supra) and the decision of this Court in the case of Deshmukh and Co. (Publishers) Pvt. Ltd. .v. Avinash Vishnu Khandekar and others (reported in 2005(3) Mh.L.J., 387). The proposition laid down in both the judgments is that the appellate Court as far as possible shall not disturb the findings of trial Court. There is no dispute about it. But, at the same time, the appellate Court is not mere spectator to allow the injustice done by the order of the trial Court. While granting temporary injunction, following three material ingredients should be kept in mind by the trial Court.

- (i) Prima facie case;
- (ii) Balance of convenience; and
- (iii) irreparable loss.

33. While deciding the prima facie case, the Court has to see whether the plaintiff has legal right in the suit property ? As observed above, it is clear that the Municipal Council, Katol is the owner of the suit property as per the order of Collector dated 31st October, 2017. There is nothing on record to show the ownership of plaintiff No.1 in respect of the suit property. Therefore, plaintiff has no prima facie case.

34. As regards balance of convenience, the public at large will suffer if the order of injunction is continued. The suit property is reserved for parking plaza. Looking to the heavy rush of vehicles, it is the need of hour to construct parking plaza so as to avoid any accident etc. If the injunction is granted/continued in favour of plaintiff then the public at large will suffer. Therefore, balance of convenience is not in favour of the plaintiff.

35. In respect of irreparable loss, if the plaintiff succeeds in the suit by proving the ownership etc., then the plaintiff can claim compensation. Shri Agnihotri, learned Counsel for the appellant has pointed out the decision of the Hon'ble Apex Court in the case of State of Jharkhand .v. Surendra Kumar Srivastava and others (reported in 2019 (4) SCC, 214), in which it is held that, "respondents failed to make out prima facie case to justify grant of interim injunction. Respondents also failed to specify area in their alleged possession on which Board proceeded to set up sub-station. Balance of comparative convenience and hardship and public interest inclined in favour of Board for construction of power sub-station over land. In case respondents succeed in establishing their title and possession over any part of land utilised by sub-station they would be entitled to compensation under Section 67(3) of Electricity Act, 2003 or any other statutory provisions. It is further held that temporary injunction rightly declined by Court."

36. From the perusal of record, there is no documentary evidence by the side of plaintiffs to show the ownership. On the other hand, from the document since year 1972 i.e. City Survey record, it shows that the suit property is shown as government property (Abadi land). Mere assessment list prepared by Municipal Council, Katol for the recovery of tax showing the name of plaintiff as occupier does not confer any title. As per the recent judgment of Hon'ble Apex Court in the case of Ravinder Kaur Grewal and others .v. Manjit Kaur and others (cited supra), the law of adverse possession is not applicable in case of public property. Learned trial Court has not considered the three material ingredients for grant of temporary injunction.

37. In view of the aforesaid facts, the appeal is allowed. The impugned order passed below Exh.40 dated 30th April, 2019 by Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 886 of 2017 is hereby quashed and set aside.

JUDGE

At this stage, Shri Shareef, learned Counsel for the respondents has submitted that the injunction granted by the Civil Judge, Senior Division, Nagpur is in force till date. Therefore, the present order passed by this Court be stayed for the period of eight weeks.

Shri M.I. Dhatrak, learned Counsel for the appellant has strongly objected the request of staying the present order made by Shri Shareef, learned Counsel for the respondents.

The order of Civil Judge, Senior Division, Nagpur granting injunction was in force till the pronouncement of this judgment. Looking to the submission, this order is stayed for the period of five weeks from today. After five weeks, this stay order shall stand automatically cancelled.