
(1994) 04 BOM CK 0042

In the Bombay High Court

Case No : Appeal from Order No. 599 of 1993

Philomena John D'souza and Others

APPELLANT

Vs

Brij Bihari Nayar and Others

RESPONDENT

Date of Decision : 08-04-1994

Acts Referred:

Citation : (1994) 96 BOMLR 929

Hon'ble Judges : Bhimrao N. Naik, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhimrao N. Naik, J.—Heard both sides. This is defendants' appeal challenging the order passed in Notice of Motion No. 3446 of 1991 in S.C. Suit No. 4387 of 1991 whereby the motion taken out by the respondents-plaintiffs was made absolute in terms of prayer (b) except bracketed portion, that is "and remaining thereupon and from removing coconuts, plants, trees, vegetables and any other material therefrom". Respondents-plaintiffs motion was made absolute also in terms of prayer (c) except the bracketed portion.

2. Few facts which are relevant for the purpose of disposal of this appeal from order are as follows ,:-

The present respondents-plaintiffs filed S.C. Suit No. 4387 of 1991 for claiming declaration that the entry made by the Talathi on 7 /12 extract of the suit property i.e. Survey No. 247 Hissa No, 3 and Survey No. 247 Hissa No. 4; Manori, Malad, Bombay in respect of Defendant No. 1 is bad in law, illegal and void and the same is required to be deleted. Further prayer in the plaint is that the 4th defendant be ordered to carry out the survey and demarcation of the suit property i.e. Survey No. 2477, Hissa Nos. 3 and 4, Manori, Malad and an injunction was claimed restraining the defendant from entering upon the suit property i.e. Hissa No. 247 Survey Nos. 3 and 4, Manori, Malad.

3. The plaintiffs have claimed that on 30th April, 1996 the suit property i.e. Hissa

Nos. 3 and 4, Survey No, 247, Manori, Malad was purchased in the name of minor son of the plaintiffs viz. Ashok Nayar. After purchasing this property, an application was filed for entering name of Ashok Nayar in the Kabjedar column. The mutation proceedings were held and in that predecessor-in-title of the present appellants herein who are defendants, raised an objection and on 12th July, 1968 after hearing both the sides the Revenue Authority i.e. Talathi of Borivali held that the purchaser-Ashoka Nayar is in actual possession of this land. He also held that the payment of land revenue for the years 1966/67, 1967/68 that is after the purchase of the property is made by the second plaintiff and since Ashok was an agriculturist and he has a right to purchase the land in question since the transaction is valid one, the Mutation Entry No. 1382 was certified on 12th July, 1968.

4. Aggrieved by this order, an appeal came to be filed by the predecessor-in-title of the present appellants herein and the appeal came to be dismissed on 24th October, 1968. Thereafter, second R.T.S. appeal was filed and even that appeal also was dismissed on 12th May, 1970. So the position till 1970 is that after purchase of the property by conveyance dated 30th April, 1966 the purchaser's name came to be entered into 7-12 extract as Kabjedar and this order was actually acted upon and necessary entry was also made in 7-12 extract. Thereafter, predecessor-in-title of the present defendants filed Suit No. 2184 of 1969 implicate for injunction and the injunction that was claimed was that the plaintiff should not be dispossessed otherwise than by due process of law. Ex parte they applied for ad interim relief and at that stage when they filed suit in 1969 there was no document supporting the claim of the present appellants here in showing their possession and since ex parte ad-interim relief was obtained without there being any -evidence whatsoever in their favour even prima facie, present plaintiffs herein appeared and applied for vacating the ad interim relief and at that stage, it appears that consent terms were arrived at between the parties. These consent terms show that the plaintiffs herein were to pay sum of Rs. 5500 to the plaintiffs in Suit No. 2418 of 1969 as and by way of consideration towards plaintiffs' right, title and interest if there are any in the suit land and the plaintiffs agreed and undertook to the Court that they shall hand over possession of the suit land viz. possession of the suit land. By placing reliance on these in the consent terms, which was never filed in the Court, though they bear signatures of the concerned parties, the present defendants contend that the factum of possession is admitted in these consent terms and the plaintiffs have filed the present suit without making any reference whatsoever to these consent terms and since they are already in possession, which fact is admitted by the plaintiffs themselves, they are not entitled for any interim relief. These consent terms are dated 30th June, 1972 and thereafter on 12th July, 1972 the suit was dismissed for want of prosecution and the ad interim relief which was granted earlier was vacated. What is important is that even under the consent terms what was required to be done by the present respondents-plaintiffs herein is only to pay sum of Rs. 5500 for a piece of land and it is shown to me that on 30th

June, 1972 the Advocate of the plaintiff in suit of 1969 gave a receipt to the Advocate of the present plaintiffs and admitted having received the sum of Rs. 5500 in cash. In support of this contention, Mr. Vaze who was the Advocate of the defendants in the earlier suit of 1969 has filed an affidavit and the plaintiffs have also produced the letter written by Advocate Kurulkar who was Advocate of the plaintiffs in 1969 suit confirming the fact of having received the said amount. It is after withdrawal of the suit in 1972, it does appear from the record, that the plaintiffs were in possession and they never lost the possession, they continued to be in possession and since they continued to be in possession by taking advantage of some stray entries in 7-12 extract, that too not in cultivation column but in the column of remarks, for the years 1984/85, 1986/87 and 1987/88 upto 1991 showing that the present respondents herein were cultivating the land, they tried to disturb the possession of the plaintiffs and, therefore, plaintiffs as mentioned above filed suit for injunction and for cancellation of these entries.

5. Mr. Walawalkar, learned Counsel for the defendants contends that the consent terms clearly established the possession of the present defendants. He says that his client is not admitting the fact of having actually received the sum of Rs. 5500 and since there is finding of the Court, he is not challenging the same seriously, though he is not admitting the same. He further contends that there is no whisper anywhere in the plaint about these consent terms though there is reference to the suit of 1968 including its withdrawal thereafter. The plaintiffs ought to have dealt with these consent terms which clearly establishes the factum of possession and in fact it is an admission and if this is taken into consideration then it should be held that the plaintiffs are not entitled for injunction and their remedy lies only in claiming possession by filing suit on the original side of this Court.

6. As against this, Mr. Thorat, learned Counsel for plaintiffs contends that after purchasing the property in the year 1966 an application is made to the Village Officer for entering the name in the 7-12 extract and since predecessor-in-title of the defendants herein raised an objection an enquiry was held by the Revenue Officer i.e. by the Tahsildar and the Tahsildar after hearing both the sides certified the entry in favour of Ashok Nayarson of the present plaintiffs. This order was challenged and all throughout the certified entry in favour of the present plaintiffs came to be confirmed and after decision in the second RTS appeal some time in the year 1970, the matter was never carried further. Instead, the suit was filed in the year 1969 and the date when the suit was filed excepting averments made in the plaint, there was not a single document supporting the case of the present defendants for possession and somehow or the other without giving any notice to the respondents, the defendants in 1969 obtained an ad interim relief. Having come to know about this ad interim relief, the present plaintiffs appeared in the suit of 1969 and they applied for vacating the said ad interim relief and at that stage there were talks of settlement and the consent terms were arrived at and the only thing that was required to be done

under the consent terms was to pay sum of Rs. 5500, That amount was also paid and since the amount was paid, the suit also came to be dismissed for want of prosecution. The withdrawal of the suit was not so innocuous, unless and until the plaintiffs in that suit received the amount he would not have withdrawn the suit because that was the only thing that was required to be done by the defendants in that suit. Thereafter also though the suit came to be withdrawn sometime in the year 1972, there is no entry even in the 7-12 extract till 1984-85 even for the year 1984-85 upto 1991 in the cultivation column the name of the present plaintiff is shown and it is only in the column of remarks and 1 am surprised to see such an entry being made in the remarks columns which is not supported by any provisions of the Maharashtra Land Revenue Code or Rules therein. Since an attempt was made by the present defendants to interfere with the possession of the plaintiffs, suit is rightly filed by the plaintiffs and they have claimed the injunction which is rightly granted by the Court and, therefore, this Court even though admitted this appeal no ad interim relief or interim relief is granted in this appeal and hence this Court should not interfere with this matter.

7. After hearing the rival contentions of the parties, I am satisfied that the case of the plaintiffs deserves to be accepted for more than one reasons. Firstly, as Mr. Thorat, contends, the property was purchased in the year 1966. After that, as anybody would do, plaintiffs applied for mutating their name and they succeeded in getting their name mutated notwithstanding the objection raised by the predecessor-in-title of the present defendants. Thereafter, in 1969 suit was filed and on the date when the suit was filed there is no evidence whatsoever showing the possession of the predecessor-in - title of the present defendants. Notwithstanding this, they managed to get ad interim order and when an attempt is made by the plaintiffs to get it vacated, they asked for their price and in fact, consent terms were arrived at but these consent terms were never submitted before the Court. The recital in the consent terms that after having received the sum of Rs. 5500 the possession will be delivered by the plaintiffs In that suit to the defendants, on the face of it that appears to be incorrect and contrary to the actual facts in existence, because there was absolutely nothing to show that the plaintiffs were in possession even on the date of signing the consent terms. Obviously for buying peace the plaintiffs herein appear to have paid the sum of Rs. 5500 and the learned Judge has rightly recorded a finding of receipt of Rs. 5500 by the predecessor-in-title of the defendants. Then the only evidence that remains in favour of the defendants is stray entries in the remarks column which will not carry any weight. Even they will not carry any presumptive value. Thus, in view of the certified entry in favour of the plaintiffs, and in view of the fact that there is conveyance in their favour and in view of the fact that they have already paid what was required to be paid even under the consent terms, it is too difficult to accept the story of the defendants that they were in possession. The fact of withdrawal of the suit and the fact that ad interim relief which was granted in their favour in 1969 was vacated on 12th July, 1972 also is a circumstance which is required to be taken into consideration. Thereafter, there

is no whisper whatsoever. It is only as a result of some stray entries when the present defendants tried to interfere with the possession of the plaintiffs and plaintiffs have rightly filed the suit and have obtained rightly an injunction which is rightly granted by the Lower Court.

Though Mr, Walawalkar tried to make out too much about the fact of non-disclosure of the consent terms, I do not think it will have any bearing because there is abundant evidence produced by the plaintiffs to show their possession. If you try to weigh this evidence in contrast to the consent terms and the peculiar facts and circumstances under which consent terms were arrived at the only plausible finding which can be recorded is one in favour of the plaintiffs that they are in possession. In fact, in my opinion the defendants' stand appears to be dishonest. Having received the amount, they tried to make reckless allegations against the lawyer which are rightly refuted by the concerned lawyer. An attempt is also made by the defendants to file some additional documents before me. A statement is sought to be produced before me which statement is denied by the other side. Unless one sees the original statement one will find it very difficult to accept the said statement at this appellate stage. Thus, there is no substance in this appeal. I entirely concur with the finding recorded by the Trial Court, The balance of convenience is also in favour of the plaintiffs. Hence, I dismiss the appeal with costs. In view of this order of dismissal of the appeal, civil application stands rejected. Observations are only prima facie observation relevant for the purpose of disposal of motion at interim stage.