
(2007) 10 BOM CK 0120
In the Bombay High Court
Case No : Writ Petition No. 324 of 2006

Shamrao Ganpat Chintamani

APPELLANT

Vs

Kakasaheb Laxman Gorde

RESPONDENT

Date of Decision : 19-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 227
Maharashtra Land Revenue Code, 1966 — Section 149, 150, 150(6), 154, 157

Citation : (2008) 2 ALLMR 118 : (2008) 2 MhLj 819

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : N.K. Kakade and A.N. Kakade, for the Appellant; S.M. Kulkarni, for the Respondent

Final Decision : Allowed

Judgement

S.B. Deshmukh, J.—Heard respective counsel.

2. Rule. By consent, Rule made returnable forthwith and the petition is taken up for final hearing.

3. This petition takes an exception to the judgment and order passed by the learned IV Ad*-hoc Additional District Judge, Aurangabad in Misc. Civil Appeal No. 149 of 2005, dated 3-9-2005.

4. The petitioner is the plaintiff and respondent is the defendant in Regular Civil Suit No. 108 of 2005. The suit was filed for perpetual injunction. The suit has been followed by an application Exhibit 5 for temporary injunction against defendant under Order XXXIX, Rules 1 and 2 of CPC (CPC). The learned Joint Civil Judge J.D. Paithan, initially i.e. on 16-6-2005 directed ad-interim injunction against defendant. Show cause notice with ad-interim injunction was made returnable on 24-6-2005. This application, after hearing the parties, came to be rejected by the trial Court on 16-8-2005. Ad-interim order passed earlier stood

vacated. This dismissal of the application Exhibit 5 was challenged by filing Misc. Civil Appeal, which came to be dismissed, after hearing the parties. Said order is questioned in this writ petition.

5. It is alleged by the plaintiff that the plaintiff has purchased the suit property by registered sale deed dated 22-3-2004 from defendant. The property purchased by the plaintiff is to the extent of 40 Ares out of land Gut No. 23, admeasuring 1 hectare and 20 ares. According to the plaintiff, from the date of sale deed, he has been inducted in to the suit property. He refers recital to that effect in the sale deed. According to plaintiff, his name is recorded in record of rights. His possession over the suit property was obstructed on 15-6-2005 and that is how, suit came to be filed with an application for temporary injunction.

6. The defendant, after entering appearance, filed reply to the application Exhibit 5. Copy of the said reply is on record at page 28. After denial, in paragraph No. 10 of the written statement, it is pleaded by defendant that the registered sale deed dated 23-3-2004 is not a document of sale. Said document is executed as a security for the loan raised by defendant. It is further pleaded that defendant was in need of money and plaintiff insisted for execution of the sale deed. Defendant was constrained to execute the document in question. The plaintiff was indulged in illegal money lending. To prevent exposure of his illegal money lending, plaintiff refused to enter into any other agreement. Since, defendant was in need of money, he accepted Rs. 15,000/- and executed sale deed. Oral agreement, according to defendant was agreed by the parties. As per the said oral agreement, within the period of three years, defendant was supposed to return the amount of Rs. 30,000/- and plaintiff was to execute re-conveyance/re-sale deed of the property in favour of the defendant. One of the terms of the oral agreement was that possession of the suit property is to remain with defendant. During earlier year of the filing of the written statement, there was good crop of cotton in the suit property. Defendant also received good yield of other crops and has returned Rs. 20,000/- to plaintiff till the filing of the written statement. He also intends to return remaining amount to plaintiff and take back the land as per the said oral agreement. The plaintiff is trying to grab the suit property for a meagre price. The plaintiff has suppressed all these facts and misrepresented this Court, while obtaining ad-interim relief. It is also pleaded that possession of the suit property is with the defendant. It was never handed over to plaintiff. The plaintiff, in collusion with the officers obtained mutation entry in his favour by following illegal procedure. The defendant has applied to the Tahsildar, objecting certification of the mutation. The plaintiff to give counterblast to the defendant, filed this suit. Certification of Mutation Entry No. 851 is illegal and not made by the authority competent to certify the mutation. 7/12 extract of the suit property is wrong and incorrect. Defendant wish to file appeal against the certification of Mutation Entry No. 815. The plaintiff is a plutocrat and trying to grab the suit property. The defendant, except the suit property, do not have any other source of income. He has accepted Rs. 15,000/-towards loan and said fact is being distorted by the plaintiff. With this pleadings, vacation of ad-interim relief as well

as dismissal of the suit was requested. This written statement seems to have been filed on 14-7-2005.

7. The trial Court has relied upon the judgment of this Court reported in the case of Pandurang v. Murlidhar 1993 BCJ 85. Since the High Court has directed expeditious hearing of the matter, the trial Court seems to be of the opinion that injunction granted needs to be vacated. In paragraph No. 6 of the judgment, the trial Court recorded a finding regarding balance of convenience in favour of the defendant. The trial Court was of the opinion that defendant will suffer irreparable loss, if it is proved that the sale deed is a conditional sale deed. With this finding, the trial Court dismissed the application Exhibit 5 and vacated ad-interim injunction.

8. The first Appellate Court in paragraph No. 6 of the judgment has observed that "While the execution of the sale deed dated 23-2-2004 by respondent in favour of appellant is not disputed, but it is seriously disputed that by said sale deed, possession of the suit land was delivered to appellant." The first Appellate Court took a notice of the affidavit of one of the attesting witnesses on the point of delivery of possession. The first Appellate Court also noted the contention on behalf of the plaintiff that said attesting witness is relative of defendant and purposely supported respondent to defeat the claim of the appellant. The first Appellate Court in paragraph No. 8 has referred to certification of mutation entry dated 20-4-2005, after the period of one year of the sale deed. The first Appellate Court wondered as to for what reason the appellant has not taken steps to mutate his name in the record of rights immediately after the sale deed is not forthcoming on record. The first Appellate Court also observed that no affidavit of adjoining landowner has been filed on behalf of plaintiff in the trial Court. Regarding contention of the defendant that defendant managed the Talathi for recording his name in cultivation column, the first Appellate Court observed that it is very easy to take such a plea making allegations against the Revenue Officer, however, difficult to prove during the trial. The first Appellate Court has also wondered as to why no explanation is coming from the plaintiff for not moving the Talathi or the learned Tahsildar, immediately after the sale deed that he was cultivating the suit land. The first Appellate Court also observed that there is no iota of evidence to show that plaintiff cultivated the suit land or possessed the suit land on the strength of the sale deed. According to first appellate Court, merely recital in the sale deed about delivery of possession in the background that one of the attesting witness is contending otherwise and supporting respondent, creates doubt that actually possession was delivered to appellant.

9. The claim of temporary injunction, made by plaintiff needs to be considered by Court in view of the provisions laid down under Order XXXIX, Rules 1 and 2 of Civil Procedure Code. Order XXXIX, Rule 1 of CPC opens with the wording, "Where in a suit, it is proved by affidavit or otherwise, temporary injunction may be granted by the Court." Prima facie case, balance of convenience and

irreparable loss are the factors which require to be taken into consideration by the Court while considering the application for temporary injunction. So far material is concerned, the Court can resort to affidavit filed by the party or otherwise. The expression "otherwise" refers to various other circumstances. In a given case there may be record of rights, various documents of title or transfer of the property or other circumstances. The consideration by the Court to such material at the stage of considering application for temporary injunction is one aspect of the matter and consideration of these circumstances, at the time of trial is different aspect of the matter. At the stage of temporary injunction, Court can refer to documents which are produced on record without formal proof. At that time of the trial Court has to take into consideration the documents which are established in accordance with the provisions of the Indian Evidence Act and proved on formal proof. In other words, formal proof of the documents, which otherwise is necessary at the time of deciding the suit in that strict sense is not necessary while considering the documents concerned at the time of consideration of the prayer for temporary injunction. Public documents can be considered at the time of temporary injunction as well as at the time of disposal of the suit without formal proof and in view of the provisions of the Indian Evidence Act. While considering the prima facie case, in case of temporary injunction the Court has to record a finding as to whether the plaintiff has established prima facie possession over the suit property. Such possession, again has to be referable, either to the title of the property or some lawful right vested with the plaintiff. After fulfilling the test of prima facie case, the Court has to turn to consider the question of equity between the parties. Irreparable loss to the plaintiff is also material while considering such application for temporary injunction.

10. In the present case, plaintiff claims to have purchased the suit property by registered sale deed dated 23-3-2004. Copy of the document is on record which shows the description of the property and consideration for the transaction as Rs. 30,000/-. This document also refers to delivery of possession by defendant to the plaintiff. This document is subsequently mutated to the record of rights under Mutation Entry No. 851, which is certified by the Circle Inspector on 20-4-2005. It is at this stage, apposite to refer to the pleadings on behalf of the defendant. Defendant has filed written statement. In relation to this document, it is pleaded by defendant in paragraph No. 10 that the document dated 23-3-2004 is executed by defendant. His contention is that it was a loan transaction. Defendant was in need of money and plaintiff was not having money lending license. Fact remains that execution of the document in question dated 23-3-2004 is admitted and accepted by defendant in the written statement. Pleadings of the parties is significant. At this prima facie stage, pleadings of defendant in relation to admitting the execution of the document dated 23-3-2004 can be considered to be a circumstance strongly against the defendant. I am not oblivious that parties have to lead their evidence in support of their contention at the time of hearing of the suit. The parties are at liberty to

lead their evidence in support of their contention and learned Judge while deciding the suit may arrive at the proper conclusion regarding the nature of the transaction. Suffice to say that the execution of the sale deed dated 23-4-2004 is admitted by defendant which recites delivery of possession of the suit property. This circumstance needs to be considered while considering the prima facie case.

11. Maharashtra Land Revenue Code, 1966 holds the field in relation to agricultural lands. Sections 149, 150 and 154 are relevant. Section 149 is in respect of acquisition by succession, survivorship, inheritance, partition, purchase, mortgage, lease, or otherwise and any right as a holder, occupant, owner, mortgage, landlord, Government or tenant of the land situated in any part of the State. It is further contemplated that the person concerned shall report orally or in writing his acquisition of such rights to the Talathi within three months from the date of such an acquisition and the Talathi shall at once give a written acknowledgment of receipt of such report to the person making it. Section 150 lays down the procedure of maintenance of Register of Mutations and Register of Disputed Cases. Sub-section (6) of Section 150 empowers the Surveyor or Revenue Officer not below the rank of Avval Karkun to certify the mutation entry which is not disputed. Otherwise, Circle Inspector is the authority who can certify the mutation entries. From the mutation entry No. 815 in the case on hand, it appears that the notice was issued to defendant who did not raise any objection and that is how said mutation was certified by the Circle Inspector on 20-4-2005. Presumption u/s 157 of the Land Revenue Code stands in favour of the mutations which are certified. This presumption, however, is rebuttable. In the case on hand, defendant may adduce evidence at the time of trial for rebutting such a presumption. However, the fact remains that mutation as of today has to be considered in favour of the plaintiff.

12. The first Appellate Court seems to have been swayed away with the certification of the mutation entry after about one year. The first Appellate Court blamed the plaintiff for not moving the authority concerned for certification of the mutation entry. In this context, look to Section 154 of the Land Revenue Code is necessary. It provides that intimation of transfer by registering officer, in relation to document purporting to create, assign or extinguish any title to or in charge of land used for agricultural purposes or in respect of which the record of right has been prepared as registered under the Indian Registration Act, be given to the Talathi of the village in which the land is situated and to the Tahsildar in such format and at such times as may be prescribed by the Rules under the Act. The document in the case on hand is a registered sale deed. This fact cannot be disputed. In view of Section 154 of the Land Revenue Code, it is in fact the duty of the Sub-Registrar/Registering Officer to inform the transaction in question to the Talathi as well as to the Tahsildar. Thus, it is not an obligation on the part of plaintiff, on the case on hand, to report the transaction to the Village Officer or to the Revenue Officer. Section 149 has to be read with Section 154 and conjoint reading shows that in case of acquisition otherwise than registered instrument, party has to make a written application to the Village Officer. Suffice to say that

in case of registered instrument, it is a legal obligation on the registering authority. If registering authority commits an error or fails in its duties, citizen like the plaintiff cannot be blamed or made to suffer. The finding of the first appellate Court is thus, suffers jurisdictional error. Any of the Courts below did not refer to the provisions of the Maharashtra Land Revenue Code, despite the fact that they were dealing with the transaction of agricultural land, mutations and record of rights.

13. The finding on possession is recorded by the Courts below against the plaintiff. On examination of the judgments of the Court below, it appears that they have accepted the contention of the defendant relied upon two affidavits by the adjoining neighbours. This material comes in the earlier expression used under Order XXXIX, Rule 1 of CPC that wherein in a suit it is proved by affidavit. It is pertinent to note that affidavit is not the only source for the Court to record a finding regarding prima facie case, balance of convenience and irreparable loss. The Courts have to consider the material on record in its entirety. The affidavits which are filed on record, have to be read in consonance with the pleadings of the plaintiff, pleadings of the defendant, document of sale, certification of the mutation and other material which is produced on record. In my considered view, the Courts below have committed jurisdictional error while accepting the affidavit in the case on hand.

14. Shri Kulkarni, learned Counsel for the respondent has placed reliance on the judgment of the learned Single Bench of this Court in the matter of Pandurang Ramchandra v. Murlidhar Shripati 1993 BCJ 85. I have perused the said judgment. The facts and pleadings of the parties are not reflected. The judicial pronouncement is a good judgment in the facts obtaining in the case wherein the judgment is delivered. The facts in the present case, I have noted in foregoing paragraphs extensively. In this view of the matter, the judgment cited by the learned Counsel for the respondent is of no assistance to the respondent.

Shri Kulkarni, learned Counsel has also invited my attention to the judgment of the Apex Court in the case of Kishore Kumar Khaitan and Another Vs. Praveen Kumar Singh, . I have perused the facts from paragraph Nos. 2 to 5. Apart from this, the Apex Court in paragraph No. 12 of the judgment has considered the scope of Article 227 of the Constitution of India. In paragraph No. 13, the Apex Court considering the scope of Article 227 and exercise thereof, observed that failure to render the necessary findings to support its order would also be a jurisdictional error likely to correction. In my view, the orders passed in the case on hand by the trial Court as well as the first Appellate Court, suffers from jurisdictional error. It is a fit case wherein this Court can exercise the power under Article 227 of the Constitution of India and upset the orders passed by the trial Court as well as the first Appellate Court.

15. At this stage, it is apposite to refer to the judgment of the learned Single Bench of this Court in the case of Venkat Dharamji v. Vishwanath 1983 Mh.L.J. 284. In that case, the suit property was allegedly purchased by the plaintiff by

agreement of sale. Said document was executed by defendant for the consideration of Rs. 31,590/-. The allegation was that amount of Rs. 20,000/- was paid before the agreement to respondent No. 1. The agreement recites that on the date of execution of the agreement, the plaintiff has obtained possession. Said agreement was on the stamp paper and written in vernacular. Said agreement had been signed by both the parties. Defendant in that suit, refuses to execute the sale deed and therefore, suit for specific performance was filed. Defendant in that suit, admitted execution of the agreement. However, it was the case alleged by the defendant that the agreement does not refer the true nature of the transaction, but it was an agreement executed only to secure the amount taken by him. It was also pleaded that no agreement of sale as alleged by the plaintiff therein was executed. On the premises of these facts, the learned Single Bench of this Court, in paragraph No. 13 has observed as under:

...However, I am at present inclined to take the view that the agreement of sale is on a stamp paper and this agreement is specifically admitted by the defendant to the extent of execution. In view of the admission of the respondent No. 1 at this stage it would be improper to infer that prima facie the recitals in the agreement are not true....

I am in respectful agreement with the view taken by the learned Single Bench of this Court in the said case.

16. Having considered the pleadings and material on record, in my view, prima facie case is established by the plaintiff. The plaintiff seems to have been inducted into physical possession of the suit property on the basis of document of sale dated 22-3-2004. From the sale deed in question, it appears that the plaintiff has purchased the suit property for the consideration of Rs. 30,000/-. This fact needs to be considered by way of balance of convenience in favour of the plaintiff. The plaintiff has established that in case of refusal of the injunction, he would be put to irreparable loss. In this view of the matter, order passed by the first Appellate Court needs to be quashed and set aside by allowing application Exhibit 5 till disposal of the suit. The suit is of the year 2005. This suit also needs to be directed to be disposed of expeditiously.

17. In the result, writ petition is allowed. The impugned order is quashed and set aside. The learned Judge seized with the hearing of the suit is directed to decide and dispose of the suit by 31-3-2008.

18. Observations made in this order are restricted to the application Exhibit 5 and Court concerned shall decide and dispose of the suit on merits and in accordance with provisions of law.

19. Rule made absolute. No order as to costs.