

(1996) 07 BOM CK 0015
In the Bombay High Court
Case No : Appeal From Order No. 116 of 1993

Shri Gramdev Laxmi-Naraiana Devalaya	APPELLANT
Vs	
Smt. Shali Datta Devidas and Others	RESPONDENT

Date of Decision : 15-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Evidence Act, 1872 — Section 3, 61
Maharashtra Land Revenue Code, 1966 — Section 105

Citation : (1997) 3 BomCR 292

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : M.S. Usgaonkar and S. Usgaonkar, for the Appellant; N. Sardessai, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—This appeal arises from the order dated 31st July, 1993 passed by the Additional Civil Judge, Senior Division, Margao, in Civil Miscellaneous Application No. 242/92/B in Special Civil Suit No. 208/92/B. The grievance of the appellant is that the trial Court while dismissing the application for temporary injunction filed by the appellant, did not take into consideration the vital document of Certificate of Record of Right in respect of the suit property and the presumption arising from the entry therein and the application was dismissed solely considering the case pleaded by the defendants and totally ignoring the case put forth by the appellant.

2. The controversy in the suit relates to property bearing Survey No. 379/7 situated at Matvem in the village of Cola in the Taluka of Canacona. The contention of the appellant is that the property belongs to him and during the new Survey the name of the appellant was put in the column "Name of Occupant" and the new Survey has been promulgated without informing anything to him including the respondents. It is the case of the appellant that

due to the services rendered by the various servants in different temples of the appellant, the properties of the appellant are allotted to such servants towards part or full consideration of such services; that the respondents had been rendering services to the Temple of Adinath and on account of such services they were allotted the property in question for enjoyment. The defendants' family discontinued the services since 1981 and as such the said property was allotted for enjoyment to the family of one Sakharam Devidas, who expired about a year prior to the filing of the suit; that on or about 12th May, 1992 the defendants without notice to the plaintiff plucked some of the coconuts from the coconut trees in the suit property and took away the said coconuts inspite of being questioned by Santosh Sakaram Devidas and subsequently threatened him that the defendants will continue to pluck the coconuts and will not allow anyone to enjoy the property. Alongwith the plaint the appellant also filed an application for temporary injunction supported by an affidavit of the Attorney of the plaintiff Committee, one Santosh Sakaram Devidas and that of Bamtu Goilo Velipo.

3. The respondents who were defendants in the trial Court contested the case of the plaintiff and contended that the property bearing Survey No. 379/7 is owned by the defendants and it is known as "Doulacodil" and has been wrongly recorded in the name of Shree Adinath Devasthan and with the name "Fondbag". It was further contended by the defendants that the said property was never allotted to the defendants by the plaintiff on account of services rendered by them to the Temple of Adinath Devasthan and that in fact the defendants were rendering the services to Temple of Adinath on payment of 3 khandis of paddy seeds per annum. The fact that defendants discontinued the services since the year 1981 was not denied. According to the defendants the property in question belonged to their ancestors and was registered under Matriz No. 686 and the defendants are regularly enjoying the said property by plucking the coconuts. It was further contended by the defendants that the property Fondbag of the plaintiff existed on the western side of the property of the defendants and is notified under Survey No. 379/1 and 379/5 of the same village. The defendants also filed their affidavit in support of their reply to the application of temporary injunction alongwith the affidavits of one Harichandra Kashi Kholkar and that of Janu Vaddo Velip.

4. The trial Court dismissed the application for temporary injunction, which has been impugned in the present appeal.

5. Shri Usgaonkar, Senior Counsel for the appellant, submitted that the trial Court has totally overlooked the case put forth by the plaintiff and based the entire order solely on submissions made by the defendants. He further submitted that the trial Court totally erred in holding that there is not a single affidavit of any member of the Committee to justify that the suit property is in the name of Adinath Devasthan when the Attorney of the Committee by name Guiri Prabhudesai has actually filed such affidavit in support of and alongwith the application for temporary injunction. He further submitted that the entry in the

Record of Rights clearly favours the appellant and there is presumption arising in favour of the appellant in respect of the said entry in the Record of Rights. In terms of section 105 of Land Revenue Code it is his further contention that the defendants have clearly admitted that the plaintiff on account of services rendered by various servants allowed the servants to enjoy the properties of the temple towards consideration of such services. In view of this clear admission on the part of the defendants, they have not justified as to what was the reason for deviation in this practice while pleading that on account of services rendered by them they were paid 3 khandis of paddy every year. The learned Counsel also drew my attention to paragraph 8 of the plaint wherein it was stated that when the defendants' family had been in service of the plaintiff they were allotted the above described property bearing Survey No. 379/7 as well as another property bearing Survey No. 2/15 and the contents of paragraph 8 of the plaint are replied by the pleadings in paragraph 8 of the written statement wherein the defendants have denied the fact regarding allotment of the property bearing Survey No. 379/7 but have not disputed the fact regarding the allotment of property bearing Survey No. 2/15. While on one hand the defendants have contended that they were being paid 3 khandis of paddy for services rendered by them to the Devasthan, on the other hand they have not disputed the allotment of property bearing Survey No. 2/15. Taking into consideration the various averments in the written statement, it is contended by the learned Counsel for the appellant that the stand of the respondents has not been consistent. Lastly it is contended that the trial Court erred in totally ignoring the affidavits filed in support of the case of the appellant.

6. Shri Sardesai, the learned Advocate for the respondents, while opposing the submissions made on behalf of the appellant, submitted that the appellant has not produced any document in support of the claim of title to the property as well as has not produced any evidence to justify the claim of possession thereof and in particular from 1981. Drawing my attention to paragraph 4 of the plaint he submitted that the plaintiff has himself admitted that the defendants were in possession of the suit property till at least 1981, that is, till they were in service of the plaintiff. According to him, therefore, it was incumbent upon the plaintiff to adduce sufficient and cogent evidence in support of his claim that the possession of the suit property was acquired by him in the year 1981 or any time thereafter. According to Shri Sardesai there is no evidence to that effect and the very admission that the defendants were in possession of the property till 1981 rebuts the presumption arising u/s 105 of the Land Revenue Code. It was further contended by Shri Sardesai that the plaintiff has not disclosed in what manner the property was being enjoyed by the plaintiff.

7. It is apparent on the face of the impugned order that the trial Court proceeded with the matter solely on the basis of the case pleaded by the defendants as contended by the counsel for the appellant. In fact the trial Court has not at all discussed the case put forth by the plaintiff and has not arrived at any finding as regards the prima facie case having been made or not by the plaintiff for the

purpose of grant of relief in the matter.

8. On perusal of the records and considering the submissions advanced the points for determination which arise in the present matter are (1) whether the plaintiff has prima facie proved that he was in possession of the suit property on the date of filing of the suit (b) whether the materials placed on record justify the balance of convenience in favour of the plaintiff/appellant and (c) whether refusal of injunction will cause irreparable loss to the plaintiff/appellant.

9. As rightly contended by the appellant there is no dispute between the parties that the defendants ceased to be in service of the plaintiff since the year 1981 and one of the properties, that is, property bearing Survey No. 2/15 which was allotted to the defendants on account of their services with the plaintiff was subsequently allotted to another person consequent to the fact that the defendants ceased to be in service of the plaintiff. It is also not in dispute that on account of services rendered by various servants in different temples, plaintiff has been allotting the properties for enjoyment of such servants as part or full consideration of such services. In fact the plaintiff has specifically pleaded this practice in paragraph 2 of the plaint and the same has been admitted by the defendants. The property in question is surveyed under No. 379/7 and the Record of Rights clearly show an entry in favour of the appellant as occupant thereof. Apart from the said entry, there is no entry in the Record of Rights in favour of any person in respect of the said property. There is an affidavit of one Santosh Sakaram Devidas stating that the said property was allotted to his father since 1981 from the time he joined the services of the plaintiff. Considering all these facts, prima facie, establish that the suit property is in possession of the appellant. In fact the entry in the Record of Rights clearly raises a presumption that the suit property is in occupation of the plaintiff/appellant. There is absolutely no material placed on record to rebut the said presumption except for two affidavits on behalf of the defendants and as already held by this Court in a number of matters the affidavit evidence cannot rebut the presumption arising from the entries in the Record of Rights. The submission of the respondents that since there is admission that till the year 1981 the respondents were in possession of the suit property on account of their employment with the plaintiff rebuts the said presumption is devoid of substance. The alleged possession was on behalf of and on account of their employment with the plaintiff/appellant. Being so, as rightly contended by the appellant, the respondents were only allowed to enjoy the said property as a part of their service condition and on termination of their services, they ceased to enjoy the same. Being so, in the absence of proper and cogent evidence in favour of the defendants, it is to be held that the appellant has prima facie proved that the property is in possession of the appellant.

10. From the records it is seen that the stand of the respondents has not been consistent as regards the terms of employment with the appellant. At one stage the respondents admit that the plaintiff had been allotting properties for

enjoyment on account of services rendered by them whereas it is claimed in the reply to the application for temporary injunction that the respondents were being paid 3 khandis of paddy every year on account of their services to the temple Adinath. At the same time they have not disputed the fact that property bearing Survey No. 2/15 was allotted to them on account of their services in the temple of the plaintiff. Though the respondents claim that the suit property is their ancestral property, they have admitted that the property bearing Survey No. 379/7 has been duly registered in the Record of Rights in the name of the appellant. While expressing ignorance of such entry in the Record of Rights in favour of the appellant, the respondents contended that the said property was in fact the respondents' property by name "deulacodil" and that it has been wrongly recorded as "Fondbag". Admittedly no such dispute regarding such entry or otherwise was raised at any time prior to the filing of the suit. There is no material placed on record to prima facie justify the claim that the property bearing Survey No. 379/7 corresponds to the property "deulacodil" which is claimed to be the property of the respondents. It is not possible to arrive at a finding at this stage that the suit property and the property "deulacodil" of the respondents is one and the same property.

11. The materials on record therefore clearly disclose prima facie case in favour of the appellant. The suit property is a immovable property and any interference therein is bound to cause irreparable loss to the appellant in case the trespassers are not prohibited from interfering therein. In the facts and circumstances disclosed above balance of convenience certainly lies in favour of the appellant.

12. The trial Court having passed the order solely on the basis of the case of the defendants, without considering the case of the plaintiff, has exercised its jurisdiction arbitrarily and it, therefore, justifies the interference of this Court. I, therefore, pass the following order:

The appeal is allowed. The respondents and their agents are restrained from interfering in the suit property during and till the final disposal of Special Civil Suit No. 208/92/B. In the circumstances, there shall be no order as to costs.

Appeal allowed.