
(1999) 03 BOM CK 0057

In the Bombay High Court

Case No : Civil Revision Application No. 217 of 1998

Shri Vassudev Nene and others

APPELLANT

Vs

Shri Dattatraya Raghunath Jog

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 115
Goa, Daman and Diu Land Revenue Code, 1968 — Section 105

Citation : (2000) 3 ALLMR 193 : (1999) 3 BomCR 684 : (2000) 1 CivCC 291

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

Bench : Single Bench

Advocate : Smt. A.A. Agni, for the Appellant; R.V. Kamat, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—This is a revision application against the Order dated 31st October, 1998 passed in Misc. Civil Appeal No. 69/92 by the Addl. District Judge, Mapusa. By the impugned order, the lower Appellate Court has allowed the appeal filed by the respondent herein against the order of the trial Court and has restrained the petitioner and their agents from disturbing the possession of the respondent over the suit property pending disposal of the suit. The trial Court by its Order dated 24-4-1992 passed in Civil Misc. Application No. 12/92 in Regular Civil Suit No. 7/92 had dismissed the application of the respondent herein.

2. The matter pertains to the property bearing Survey No. 9/1 in the village of Sonal in Sattari Taluka and admittedly belonging to the family of Kamat from Sanquelim. The property comprises of arecanut trees, coconut trees, mango trees and other fruit bearing trees besides cashew grove, rubber plantation, sugarcane plantation and other jungle trees.

3. It is the case of the respondent that the suit property is enjoyed and possessed by him for the last several years and the petitioners who were having agricultural property adjoining the suit property while trying to lay a false claim over the suit property, made attempts to pluck the cashew trees and therefore

the respondent was compelled to file the suit and to seek for interim relief.

4. As against this, it is the case of the petitioners that the suit property is on lease to them by the owners of the property and they have done the arecanut and cashew plantation in the property and it was only with the permission of the petitioners that in some portion of the property the respondent was allowed to plant sugarcane. It is their further case that in the earlier suit between the respondent and the owners of the property that the respondent had admitted that the property was leased to the petitioners by the owners of the property.

5. The trial Court had rejected the application for temporary injunction filed by the respondent holding that the lease deed dated 12-4-68 established the tenancy of the suit property in favour of the petitioners who are the defendants in the suit and that the fact of lease of the suit property in favour of the petitioners was suppressed by the respondent while approaching the Court. The trial Court has further held in Special Civil Suit No. 33/90 filed by Kamat at Bicholim Court against the respondent herein, the latter had pleaded that he came in the suit property through the petitioners. The trial Court has further held that there was no disclosure by the respondent as to who created the tenancy of the suit property in favour of the respondent and what was the rent and whether it was paid in cash or kind and to whom it was being paid. While holding that no materials in that regard are disclosed, the trial Court has observed that the claim of the entire plantation in the suit property by the respondent is false as the documentary evidence shows that the arecanut trees were existing in the suit property prior to the date of alleged entry of the respondent in the suit property. The respondent is the brother-in-law of the petitioners, and used to help the petitioners in agricultural operation in the suit property and had no independent right or interest in the suit property. And lastly, that the presumption u/s 105 of the Land Revenue Code in respect of the entry in Record of Rights in favour of the respondent stood rebutted in view of the materials placed on record by the petitioners.

6. As against this, the lower Appellate Court has held that since the petitioners themselves had stated that the respondent was allowed to do the work of maintenance and irrigation, the petitioners have admitted that the lease taken from Kamat was given by them to the respondent and that therefore the petitioners themselves admitted that the property is in possession of the respondent. The lower Appellate Court has further held that the documentary evidence placed on record is not sufficient to rebut the presumption u/s 105 of the Land Revenue Code in favour of the respondent. Besides, the respondent has obtained loan from the Bank by mortgaging the suit property. Some materials came to light after filing of the written statement, but that by itself, would not amount to suppression of facts by the respondent so as to deny the equitable relief to the respondent. The lower Appellate Court has further held that the lease deed of 1968 does not rebut the presumption arising in respect of the entry made after 1971 in the Record of Rights in favour of the respondent. Placing

reliance upon an undertaking stated to have been given by one Razak while removing the timber from the suit property, the lower Appellate Court has held that the respondent is tenant in respect of the suit property and further that the materials on record are sufficient to hold that the respondent is in possession of the suit property.

7. Upon hearing Smt. Agni, learned Advocate appearing for the petitioners and Shri R.V. Kamat,, learned Advocate appearing for the respondent and on perusal of the records, it is evident that the trial Court had refused to grant temporary injunction mainly on three grounds i.e. firstly that the lease deed of 1968 disclosed the possession of the petitioners in their capacity as lessees of the suit property, secondly suppression of material documents and facts by the respondent and thirdly, that the materials on record rebut the presumption arising in favour of the respondent pursuant to the entry in his favour in the Record of Rights in relation to the suit property. On perusal of the impugned judgment and order, it is apparent that the lower Appellate Court while setting aside the order of the trial Court has observed that the respondent has not disputed the lease agreement executed between the owner of the suit property and Vishwanath R. Nene and Vassudev B. Nene. The said Vassudev is petitioner No. 1 and the said Vishwanath was the father of petitioner No. 1. The lower Appellate Court while setting aside the order of the trial Court has not disturbed the finding of the trial Court as regards the lease agreement of the suit property in favour of the petitioners. It is therefore apparent that both the courts below have arrived at concurrent finding as regards the lease agreement in respect of the suit property between the owners of the property on one side and the petitioner No. 1 and his father on the other side. There is no doubt that in the course of survey carried out subsequent to the execution of the said lease deed, there is an entry in favour of the respondent. In terms of section 105 of the Land Revenue Code such entry certainly carry presumptive value. While dealing with the said issue, the lower Appellate Court however has observed that the existence of the lease deed which was executed in the year 1968 and the admission in Special Civil Suit No. 33/90 cannot rebut the presumption arising in favour of the said entry in favour of the respondent. No fault can be found with the observations of the lower Appellate Court that mere execution of the lease deed in the year 1968 cannot rebut the presumption arising in favour of the respondent in view of the said entry in the Record of Rights. Rightly so because the lease deed was certainly prior to the entry in the Record of Rights. However, as observed by both the courts below there is a clear admission by the respondent in Special Civil Suit No. 33/90 that the respondent entered the suit property through the petitioners. In other words, the respondent has not acquired any right or interest in the suit property independently and de hors the leasehold right in favour of the petitioners under the lease deed of 1968 and these facts have been clearly admitted by the respondent. It is pertinent to note that this admission was made subsequent to the entry being made in the Record of Rights. There is no disclosure in the records placed before this Court as to

since when the property was given in the possession of the respondent by the petitioners. Once it is admitted by the respondent that the property was in possession of the petitioners, while admitting the lease deed between the petitioners and the owners of the property, and it was the claim of the respondent that the possession of the suit property was delivered to him by the petitioners, it was necessary for the respondent who is the plaintiff in the suit to disclose as to how and since when possession was delivered to the respondent by the petitioners and in what capacity it is retained by the respondent. In the absence of any such disclosure and the said admission, the presumption arising under the said entry in the Record of Rights in favour of the respondent, clearly stood rebutted. The lower Appellate Court has totally ignored this aspect and merely because the lease deed was executed in the year 1968, arrived at the finding that presumption arising in favour of the respondent under the said entry was not rebutted by the documentary evidence. The finding is clearly contrary to the materials on record and has been arrived at in arbitrary exercise of its jurisdiction.

8. In fact, the trial Court, after analysing the entire materials on record as regards the lease deed, the entry in the Record of Rights and the statement by the respondent in the earlier suit, had arrived at finding that the presumption u/s 105 of the Land Revenue Code in respect of the entry in favour of the respondent was not available. Unless the view taken by the trial Court on the basis of the analysis of the materials on record was so improper that no such view could not have been taken by a man of prudence or that it was so perverse or arbitrary or that it was not borne out from the records, considering that the lower Appellate Court was dealing with the appeal against the discretionary order passed by the trial Court, applying the test laid down by the Apex Court in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, it was not possible for the lower Appellate Court to arrive at the finding different from the one by the trial Court solely because some other view was also possible.

9. It is now well established that in a matter where a party seeks an equitable relief, the party has to approach the Court with clean hands and should not suppress any material fact or document, otherwise he or she cannot seek indulgence of the Court for any equitable relief. In the case in hand, the finding arrived at by the trial Court duly supported by the records disclose that the fact regarding execution of the lease deed in the year 1968 by the owners of the property in favour of the petitioner No. 1 and his father as well as the fact regarding the admission on the part of the respondent regarding possession of the suit property being claimed through the petitioners in the earlier suit being Special C.S. 33/90 between the owners of the property and the respondent, were clearly suppressed from the trial Court. Not only the said facts were suppressed, but the documents pertaining to those facts were also not disclosed to the Court. It was only after filing of the written statement by the petitioners that the said facts and documents came to light. In this regard, learned Advocate for the petitioners is well justified in placing reliance upon the judgment in the matter of

M/s. Seemax Construction (P) Ltd. v. State Bank of India and another, reported in AIR 1992 Delhi, 197. In the said suit, the plaintiff therein had approached the Court seeking relief of permanent injunction along with an application for interim relief without disclosing the fact of filing of two earlier suit which were withdrawn later on. In that regard, the Delhi High Court observed thus:-

"The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the Court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from Court is not entitled to any discretionary relief. The Court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the Court. Reference may be made to decision in *The King v. The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington, 1917*(1) Kings"s Bench Division 486 where the Court refused a writ of prohibition without going into the merits because of suppression of material facts by the applicant. The legal position in our country is also no different. See: *Charanji Lal v. Financial Commissioner, Haryana, Chandigarh, A.I.R 1978 P & H 326* . Reference may also be made to a decision of the Supreme Court in *Udai Chand Vs. Shankar Lal and Others, .* In the said decision the Supreme Court revoked the order granting special leave and held that there was a misstatement of material fact and that amounted to serious misrepresentation. The principles applicable are same whether it is a case of misstatement of a material fact or suppression of material fact."

10. The fact that there was a lease deed executed between the owners of the property in favour of petitioner No. 1 and his father in the year 1968 and that the respondent in the earlier suit had pleaded that he came in the suit property through the petitioners, can by no stretch of imagination be said to be a fact not material for the decision in the matter. The suppression of material facts therefore clearly disentitles the respondent to get any equitable relief.

11. The undertaking given by one Razak of Valpoi wherein the respondent was disclosed to be the tenant is of no help to hold that the possession of the suit property was with the respondent. The signature of the petitioner No. 1 on the said undertaking as witness for the execution of the said document by the said Razak by itself cannot be sufficient to attribute knowledge of the contents of the document to the petitioner No. 1.

12. Shri R.V. Kamat, learned Advocate, appearing for the respondent, did submit that the materials on record shows that the respondent was in possession with the consent of the petitioners themselves and that is evident from the fact that the petitioners themselves admit that the respondent was allowed to look after the arecanut trees from the suit property by the petitioner No. 1 by doing the work of maintenance and irrigation. There is no doubt that there is a clear

averment in that regard in the written statement which reads as: "These defendants state that the plaintiff was allowed to look after the arecanut trees in the suit property by defendant No. 1 by doing the work of maintenance and irrigation." However, the said statement cannot be read disjunctively and in isolation, but has to be read along with other pleadings in the written statement. It is evident that the case of the petitioners is that the property is in their possession as the lessees thereof and the respondent being relative of the petitioners was allowed to do certain work in the suit property as has been held by the trial Court. Even otherwise, a party approaching the Court seeking to restrain the respondent from interfering with the possession of the suit property with the plaintiff, has to establish that the possession can be related to some right or title of the plaintiff to the suit property. In other words, in order to obtain a relief from the Court to protect possession of the party such possession has to be lawful possession.

The learned Single Judge of this Court in *Mulji Umershi Shah and etc. Vs. Paradise Builders Pvt. Ltd. and Others*, has observed that:

"In the suit for perpetual injunction the Court, may be called upon to hold inquiry in title, right, interest or status, as the case may be, of the plaintiff to find out whether plaintiff is entitled to protection of his possession by decree of injunction. The same consideration, prima facie, is required to be seen while considering an application for temporary injunction. The question of possession presupposes lawful possession and for adjudication of that question whether finally or at interlocutory stage, the inquiry into title, right, interest or status of plaintiff is not foreign to the subject matter."

Similarly, the Apex Court has held in *Premji Ratansey Shah and Others Vs. Union of India (UOI) and Others*, that :-

"Issuance of an order of injunction is absolutely a discretionary and equitable relief. In a given set of facts, injunction may be given to protect the possession of the owner or person in lawful possession. It is not mandatory that for mere asking such relief should be given. Injunction is a personal right u/s 41(j) of the Specific Relief Act, 1963; the plaintiff must have personal interest in the matter. The interest of right not shown to be in existence, cannot be protected by injunction"

13. Shri R.V. Kamat, learned Advocate, appearing for the respondent, sought to rely upon the decision of the Apex Court in the matter of *Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao*, and in the matter of *Ram Rattan and Others Vs. State of Uttar Pradesh*, . In the matter of *Krishna Rama Mahale v. Mrs. Shobha Venkat Rao (supra)* it was a case where the Apex Court has held that it is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of property except by recourse to law. It was a case where the plaintiff had filed a suit for recovery of

possession of premises upon which she had entered as a licensee to conduct the business of restaurant; she was subsequently dispossessed by the licensor unlawfully and in her absence. Immediately thereafter she filed suit for recovery of possession. In that regard, the Apex Court has observed that since the plaintiff was unlawfully dispossessed, it could not be said that the licence expired long back and that the plaintiff being not entitled to renewal of licence could have only asked for damages for unlawful possession. In the background of those facts, the Apex Court had held that the plaintiff being in settled possession, she could not have been dispossessed except by recourse to law. In Ram Rattan's case, the Apex Court has held that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing, but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law. That was a case where the plaintiff was in peaceful possession of a land to the knowledge of the opponent and therefore it was held that he was entitled to defend his possession and the opponent being the aggressors and had opened the assault, could not have claimed any right of private defence either of person or property. Clearly on facts, both the decisions are distinguishable and the observations therein are not applicable to the facts of this case.

14. Considering the law laid down by the Apex Court and by this Court in the above referred decisions and applying the same to the facts of the case in hand, apart from the certificate of Record of Rights, the respondent have not produced any material on record to establish that the respondent is in lawful possession of the suit property. As already observed above, as far as entry in the Record of Rights is concerned, the same stands rebutted. The conduct of the respondent also does not justify grant of any equitable relief in his favour. In the circumstances, therefore, the lower Appellate Court clearly erred in interfering with the order of the trial Court and by granting the temporary injunction in favour of the respondent by the impugned order. The impugned order clearly discloses improper exercise of jurisdiction by the lower Appellate Court. The impugned order cannot be sustained and is liable to be quashed and set aside.

15. In the result, the petition succeeds. The impugned order is hereby quashed and set aside. The order of the trial Court dismissing the application for temporary injunction filed by the respondent stands confirmed. The respondent to pay costs of Rs. 1000/- to the petitioners. Rule is made absolute in the above terms.

16. Petition allowed.