

(2007) 07 BOM CK 0126

In the Bombay High Court

Case No : Writ Petition No. 2509 of 2007

State of Maharashtra and Others

APPELLANT

Vs

Md. Sharif Haji Sharif and Another

RESPONDENT

Date of Decision : 27-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151, 94
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 114
Specific Relief Act, 1877 — Section 54
Transfer of Property Act, 1882 — Section 53A

Citation : (2008) 3 BomCR 381

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

Bench : Single Bench

Advocate : D.V. Tele, A.G.P, for the Appellant; P.G. Godhamgaonkar and M.V. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

Deshmukh S.B., J.—This petition is directed against the judgment and the order passed by the learned Principal District Judge, Nanded, in Misc. Civil Appeal No. 108/2006 on 22-11-2006.

2. The petitioners in this writ petition, are the defendants in R.C.S. No. 223/2006 filed by the respondent, who is the plaintiff in that suit. Parties hereinafter, are referred to their status as plaintiff and the defendants in R.C.S. No. 223/2006. The plaintiff, sought a decree for perpetual injunction restraining the defendants, their employees and servants from making any sort of interference and obstruction to the peaceful possession of the plaintiff in C.T.S. No. 9978 and 9980, corresponding to Municipal Corporation No. 1-14-1035 out of land Survey No. 19 of village Asadullabad. The area of the suit property is to the tune of 4215 sq. ft. as described in the suit itself. This application, Exhibit-8, is filed alongwith the suit itself on 14-03-2006. Initially, the trial Court, issued notice to the defendants. According to the learned Counsel for the respondents Mr.

Godhamgaonkar, status quo was issued by the trial Court by passing order on Exhibit-22. Thereafter, below Exhibit-37, the trial Court has further passed order on 20-7-2006, extending and continuing earlier status quo granted below Exhibit-22 till next date. This status quo seems to have been further extended till September 10, 2006 by the order passed by the trial Court on August 31, 2006. There is no dispute that the trial Court after hearing the parties, rejected the application for temporary injunction below Exhibit-8, by the order passed on August 25, 2006.

3. The plaintiff, being aggrieved by the rejection of the temporary injunction application, filed Misc. Civil Appeal before the learned District Judge, Nanded. It was Misc. Civil Appeal No. 108/2006. This Misc. Civil Appeal, after hearing the parties, has been allowed by the learned District Judge, Nanded by the judgment and the order on November 22, 2006. The order passed by the trial Court, rejecting the temporary injunction application Exhibit-8 is quashed and set aside and the said application is allowed by the Appellate Court. It is this order, which is challenged by the defendants, in this writ petition under Article 227 of the Constitution of India.

4. The learned Counsel for the plaintiff, submitted that the land Survey No. 19 is situated at Asadullabad District Nanded. The land to the tune of 4215 sq. ft., is the subject-matter of the suit, as noted above. This piece of land was erstwhile hold by one Purushottam Pathak. Said Mr. Pathak entered into an agreement in relation to this land to the tune of 4215 sq. ft., i.e. C.T.S. No. 9978 and 9980 in favour of the plaintiff. This agreement, is, dated October 23, 1997. Advocate for the plaintiff admit that this agreement is not registered. In view of this agreement, erstwhile owner Mr. Pathak did not execute the sale deed, the plaintiff, therefore, required to file R.C.S. No. 65/ 1999 before the learned Civil Judge, Senior Division, seeking specific performance of the said agreement. There is no dispute that the defendants in this suit R.C.S. No. 223/2006, were not parties in R.C.S. No. 65/1999. The suit filed by the plaintiff for specific performance of the agreement R.C.S. No. 65/1999, after recording the evidence came to be decreed by the Civil Court. The decree was passed on November, 21, 2002. The plaintiff in this suit, was also the plaintiff in R.C.S. No. 65/1999, filed Execution petition. It is not in dispute that in view of the order passed by Executing Court, the sale deed of C.T.S. No. 9978 and 9980 came to be executed by the Court Commissioner in favour of the plaintiff in R.C.S. No. 223/2006.

5. The controversy in the case on hand, is in relation to the identification/location of the suit property as well as the possession of the suit property. The plaintiff claims that the possession has been given to him, by first owner Mr. Pathak on the date of unregistered agreement executed by Mr. Pathak, on October 23, 1997. The record of the suit as well as appeal, from the Court was called for. The said record and proceedings are received. Original agreement is not on record in R.C.S. No. 223/2006. Xerox copy is filed by the plaintiff in this suit. Mr. Godhamgaonkar, the learned Counsel for the plaintiff has invited my attention to

this agreement i.e. xerox copy of the agreement of sale. He has pointed out from the last line of this agreement that the possession of the suit property i.e. to the tune of 4215 sq. ft., has been delivered to the plaintiff by this agreement. He further submitted that this agreement is given effect to record of right i.e. C.T.S. record, maintained by the State Authorities. C.T.S. card is also placed on record. Copy of the sale deed is also a part of record. Mr. Godhamgaonkar, learned Counsel claimed possession of the plaintiff over the suit property on the basis of this xerox copy of unregistered agreement, C.T.S. record i.e. card for C.T.S. No. 9978 and 9980.

6. The trial Court, has referred to the unregistered document dated October 23, 1997 and claim of the plaintiff, in relation to the possession of the suit property in Paragraph 4 of the judgment. The trial Court, in Paragraph 5 of the judgment has referred to order passed by Tahasildar, Nanded, regarding inquiry in respect of the land Survey No. 19 situated at Asadullabad, District Nanded. In paragraph 5 of the judgment, trial Court, has referred to the order passed by the Tahasildar, as noted in foregoing paragraphs. In paragraph 6 of the judgment, the trial Court has referred to the passing of the Award on February 06, 2006. The trial Court, referring to the material placed on record ultimately held that the prima facie case is not established by the plaintiff. Neither balance of convenience tilts in favour of the plaintiff. The trial Court ultimately, with reasoned judgment, rejected/dismissed the application of the plaintiff Exhibit-8 for temporary injunction.

7. I have also perused the judgment and the order passed by the Appellate Court. The Appellate Court in its judgment, referred the submissions of the learned Counsel for the parties. In paragraph 7 of the judgment, First Appellate Court has referred to the order passed by the Tahasildar and claim of the P.W.D. in the suit property to the area of 0 Acre 20 Gunthas. The first Appellate Court in paragraph 14 of the judgment, observed, that the plaintiff has prima facie established his possession over the suit plot, may it be on the basis of ownership or in the alternate as encroacher or trespasser. According to the Appellate Court, such trespasser cannot be dispossessed without following due process of law. The first Appellate Court has also observed that the document of sale deed prima facie point out towards legality of possession. With this, the first Appellate Court has quashed and set aside the order passed by the trial Court below Exhibit-8 and granted temporary injunction.

8. The learned Counsel for the original plaintiff has invited my attention to some judicial pronouncements. He relies on the judgment of the Apex Court in the case of Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another, , against the judgment and order passed by Karnataka High Court in R.F.A. No. 8/1991. Needless to mention that the suit was finally disposed of, after recording of evidence and therefore, matter was carried to appeal and ultimately civil appeal before the Apex Court. The Apex Court, in view of the facts, circumstances and evidence brought on record in the cited judgment, held that

settled possession gives right to possession so that rightful owner may only recover it by taking recourse to law. Another judgment relied on by learned Counsel Mr. Godhamgaonkar, is in the matter of Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, . It was also against the civil appeal. The evidence was recorded in the suit and ultimately the matter was before the Apex Court as the civil appeal. The interpretation of Section 53-A of the Transfer of Property Act was the principal point in the matter of Shrimant Shamrao Suryavanshi. In this background, the Apex Court held that the defendant transferee obtained possession in part performance of contract and such possession over property is protected even if period of limitation for bringing suit for specific performance of an agreement to sell has expired. The Counsel for the plaintiff, also relied on a judgment of the Apex Court, in the matter of Venkat Dharmaji Gontalwar Vs. Vishwanath and Another, . It was in relation to Sections 151 & 94, Order 39, Rules 1 and 2 of the CPC and Section 53-A of the Transfer of Property Act. The Apex Court held that recital in agreement as regards delivery of possession and payment of part of consideration especially when the defendant-owner admitting execution of agreement, the plaintiff is entitled to the relief of temporary injunction. The ratio of Apex Court in this matter is not helpful to the present plaintiff for the reason that it is not the suit between first owner of the plaintiff Mr. Pathak and the plaintiff alone. Here, it is the suit filed by the plaintiff against the State Government, its authorities and Nanded Corporation. In the cited judgment, execution of an agreement was admitted by the transferee in that matter who was the defendant. Therefore, the Apex Court, in this premises, held that the plaintiff in that case is entitled for the temporary injunction under Order 39, Rules 1 and 2 of the CPC since the delivery of possession was mentioned in the said agreement to sell and the execution was admitted by the defendant, the erstwhile owner of the property.

9. The learned Counsel for the plaintiff submits that so far as the defendants are concerned, they are placing reliance on the mutation record, in the record of rights. This is in respect of P.W.D. of the State Government, in whose favour the entry for the land to the tune of 0 Acre 20 Gunthas is recorded. According to him, such mutation do not confer the title to the party. In fact, for such proposition, no judgment is required to be referred to. However, the learned Counsel Mr. Godhamgaonkar, relies on the judgment of the Apex Court in the matter of State of Himachal Pradesh Vs. Keshav Ram and others, . Section 114 of the Evidence Act, is considered by the Apex Court and it is held that the entry in revenue record cannot form basis for declaration of title.

10. From the record, it appears that the land Survey No. 19 in its entirety is to the tune of 9 Acres and 27 Gunthas. It is apparent from the order which is on record in relation to the change of user from the agriculture to non agriculture use. Out of land of 9 Acres 20 Gunthas, the suit property in the present suit, is to the tune of 4215 sq. ft. In my view, the principal piece of evidence prima facie in favour of the plaintiff is copy of the agreement to sell executed by erstwhile owner Mr. Pathak, on October 23, 1997. This piece of document in its originality

or certified copy is not admittedly produced on record. The claim of the plaintiff regarding possession is based on this document. The existence of C.T.S. record, of C.T.S. No. 9978 and 9980 is on the basis of such agreement to sell and there is sale deed which is executed by the Court commissioner. In the matter of temporary injunctions, Courts are concerned with the lawful possession of the parties. The Apex Court in the matter of Rame Gowda has referred Division Bench judgment of Bombay High Court and ratio is approved by the Apex Court, in the matter of Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another, . It was the suit for perpetual injunction wherein provision laid down u/s 54 (Specific Relief Act, 1878) was considered by Division Bench of this Court. Division Bench of this Court, therefore, while considering the decree for perpetual injunction, held, that it is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and that his possession was invaded or threatened to be invaded by a person who had no title thereof. In my view, while considering the application for temporary injunction under Order 39, Rules 1 and 2 of the Code of Civil Procedure, Court is concerned with prima facie proof of possession of the plaintiff, referable to a lawful right. It is not necessary every time that the plaintiff can establish his title to the property at the stage of consideration of temporary injunction. All that is required is that, the plaintiff, has to establish his prima facie possession over the suit property, referable to a lawful right. Here in the present case, the trial Court has recorded finding that there is no prima facie case in favour of the plaintiff. The trial Court, has further taken a note of Award passed by the Land Acquisition Officer and observed that if at all part of the property owned by the plaintiff, is acquired by the State Government, title stand vested with the State Government and the plaintiff is entitled for compensation. There is no dispute that the award in the present case, is passed on February 06, 2006. There is no dispute that some part of Survey No. 19 to the tune of 0.06R (about 600 sq. mts) is the subject-matter of the award. It is well established in law that on the date Of passing of the award of immovable property, title stand vested with the State Government without any encumbrances. This reasoning of the trial Court has been upset by the first Appellate Court. The Appellate Court went on observing that trespasser also can be protected, unless he is evicted by following due process of law. I am not able to accept this finding of the first Appellate Court. While substituting judicial discretion, the first Appellate Court, has to substitute it in accordance with the established principles of exercise of discretion, that is not done by the first Appellate Court.

11. The learned Counsel have addressed this Court on various points. Since I am considering the order passed by the trial Court under Order 39, Rules 1 and 2 of the Code of Civil Procedure, in Misc. Civil Appeal, I am restraining myself from expressing any opinion in relation to the various submissions on behalf of the learned Counsel for the parties. The identification of the suit property is a problem which can be sorted out after recording evidence in the suit. Possession

of the suit property also can be established by the plaintiff, by adducing evidence in the suit.

12. One more aspect of the matter, is in relation to the development of city of Nanded; Advocate of the plaintiff do not dispute that this property is within limits of Nanded Corporation. Advocate for Corporation submits that the construction work of road is being undertaken. Corporation, is ready to pay for the compensation in accordance with the provisions of law. Development plan of the city not to be hold up, is the submission on behalf of the learned Counsel for the Corporation.

13. In my view, case for interference is established. The order passed by the first Appellate Court granting temporary injunction below Exhibit-8 needs to be quashed and set aside with further direction to decide and dispose of the suit expeditiously i.e. within period of three months from the appearance of the parties. The parties shall appear in the trial Court on August 13, 2007, at 11-00 a.m.

14. Writ petition, is allowed in above terms, by quashing and setting aside the judgment and order passed by the Appellate Court in Misc. Civil Appeal No. 108/2006. Record and Proceedings of the suit to be sent to the Court concerned within period of one week from today, if necessary, through special messenger.

15. At this stage, the learned Counsel for there plaintiff seeks suspension of this order for one week"s period. The learned A.G.P. and Mr. Deshpande, learned Counsel for defendants, have pointed Out that ad interim relief is granted by this Court, by order dated April 26, 2007. The learned A.G.P. says that the construction work of road is in progress. In this view of the matter, oral request made by Mr. Godhamgaonkar, stands rejected.

Authenticated copy of this order be given to all the parties as usual practise.