
(2023) 03 BOM CK 0052
In the Bombay High Court
Case No : Second Appeal No. 241 Of 2006

Tulshiram	Vs	APPELLANT
Tahsildar, Washim And Others		RESPONDENT

Date of Decision : 13-03-2023

Acts Referred:

Citation : (2023) 03 BOM CK 0052

Hon'ble Judges : M.S. Jawalkar, J

Bench : Single Bench

Advocate : V.A. Lohia, R.L. Khapre, M.A. Kadu

Final Decision : Allowed

Judgement

M.S. Jawalkar, J

1. The Appellant filed present Appeal being aggrieved by the judgment and decree passed by the learned 2nd Ad-hoc Additional District Judge, Washim in Regular Civil Appeal No. 89/2001 decided on 13/12/2005 arising out of the judgment and decree passed by the learned Civil Judge Senior Division, Washim in Regular Civil Suit No. 141/1997 dated 15/03/2000, whereby the Appeal filed by the Defendants came to be allowed.

(2) The brief facts for deciding the present Second Appeal are as under:-

The Appellant herein is the original Plaintiff who had filed the Suit i.e. Regular Civil Suit No. 141/1997 for Permanent Injunction. It is the contention of the Plaintiff that the Suit Property is a room ad-measuring 16 x 20 square feet constructed with stones and mud in which a flour mill is erected in the year 1985 and the said constructed room is the ancestral and old one property of the Plaintiff. The Suit Property is more particularly described in Paragraph 1 of the Plaint. The room is ancestral property of the Plaintiff which is constructed by his ancestors, around 50 years ago and in that room, the Plaintiff erected flour mill in the year 1985. In March, 1997, the Defendants claimed that the Defendants

auctioned the Suit Property to one Prakash Chinkuji Kakade. Not only this, on 19/06/1997, the Defendant No. 1, without any right, informed the Defendant No. 2 i.e. Maharashtra State Electricity Board to disconnect the electric supply of the flour mill. Accordingly, the line-man from MSEB came to the flour mill of the Plaintiff on 19/06/1997 for disconnecting the electric supply. However, at the request of the Plaintiff, he returned back. When the Plaintiff made enquiry with the Defendant No. 1, it was contended by the Defendant No. 1 that the construction of the Suit Property is over the Government land. Hence, the Plaintiff should remove the said construction. It is claimed that the said Suit Property is auctioned to Prakash Kakade and if the Plaintiff does not remove the said construction, the Defendant No. 1 would remove the same through Government Machinery. In view of the apprehension that the Defendant No. 2, without any right, would illegally use the Government Machinery to remove the Suit Property, the Plaintiff was constrained to file the Suit. The Plaintiff claimed Permanent Injunction restraining the Defendant No. 1 from removing the Suit Property and further restraining the Defendant No. 2 from disconnecting the electric supply of the Suit Property.

The Defendants filed written statement and resisted the claim on the ground that the said plot was auctioned to Prakash Kakade and therefore the Government has every right to remove the encroachment upon the Suit plot. The Defendant No. 2 – MSEB has also filed written statement and submitted that it has nothing to do with the ownership and the plot in question however, if the encroachment has to be removed, the electricity supply has to be stopped. The Defendant No. 3 – State of Maharashtra was added as a party subsequently. It adopted the written statement filed by the Defendant No. 1.

The learned Trial Court held that the Plaintiff proved that he is the owner of the Suit Property and the encroachment was not at all proved. It is also held by the learned Trial Court that the Defendants, without any right, are illegally trying to dispossess the Plaintiff from the Suit land as well as disconnecting the electric supply and decreed the Suit. State of Maharashtra and Tahsildar filed Regular Civil Appeal No. 89/2001. The Appellate Court allowed the Appeal and set aside the judgment and decree passed in Regular Civil Suit No. 141/1997 dated 15/03/2000 and reversed the finding recorded by the learned Trial Court. The said judgment and decree of the learned Appellate Court is the subject matter of challenge in the present Appeal.

(3) Learned Counsel for the Appellant vehemently submitted that the Defendants were claiming that the Suit Property was auctioned to one Prakash Kakade in 1997, which is a Government land and they were taking action for removal of encroachment. It is also contended that there is not a single document placed on record by the Defendants to establish that the land is belonging to the Government. The construction is as old as more than 50 years and the flour mill is set up in the year 1985. Since 1985 to 19/03/1997, neither any action was taken nor any question of encroachment was raised by anybody. There is no

mention of any overt-act on the part of the said Prakash Kakade disturbing possession of the Plaintiff.

(4) Learned Counsel for the Appellant, in support of his contentions, relied on the judgment in Civil Appeal No. 878/2009 (Smriti Debbarma (Dead) Through legal representative vs. Prabha Ranjan Debbarma & others) reported in 2022 LiveLaw (SC) 19.

(5) This Court, vide order dated 29/10/2007, has framed the following substantial question of law:-

“How can a person can be evicted forcibly when possession is good title against entire world except true owner and on that principle Courts below have placed wrong burden on Plaintiff even though admittedly Plaintiff is in possession of the property?”

(6) Heard learned Counsel for both the parties, gone through the judgments and decree passed by both the Courts below, considered the rival contentions of the parties and the citation relied on.

(7) Learned Appellate Court reversed the finding of the learned Trial Court. It appears that the Plaintiff examined himself and one Dnyanba Hajare. On behalf of the Defendant No. 1, one Pralhadrao Lokhande has been examined whereas no oral evidence has been adduced by the Defendant No. 2 as well as the Defendant No. 3. As per the Plaintiff, he was running flour mill since last 14 years in a room constructed by him. His flour mill, residential house and Kotha are adjacent to each others and the same are his ancestral property. Gram Panchayat, Adgaon itself has given sanction by passing the Resolution dated 12/12/1983 which is at Exhibit No. 35. He placed on record the tax receipts of the said flour mill (Exhibit No. 36) paid to the Gram Panchayat. MSEB also gave electric connection to the said flour mill. The Certificate to that effect is at Exhibit No. 34. His deposition is supported by PW-2 Dnyanba who was Sarpanch of Village Gram Panchayat. As per his deposition, the said flour mill is there in existence since last 15 years. According to him, cattle shed, residential house and flour mill of the Plaintiff are adjacent to each other. This fact of grant of permission by the Gram Panchayat is not disputed by the Defendants. There is no notice for around 12 to 13 long years about any encroachment. It appears that no measurement of the Suit Property is carried out to come to any conclusion of encroachment. On perusal of the order of auction (Harras Patti) shows that the Plot No. 3 was allotted to one Prakash Kakade, however, there is nothing on record to show that in the said plot, the Plaintiff is running the flour mill. There is Gram Panchayat's Resolution at Exhibit No. 51.

(8) Learned AGP has drawn my attention to the said Resolution at Exhibit No. 51. It is contended that in pursuance to the Resolution passed by the Gram Panchayat, the said action of encroachment has taken place. The witness of the Defendants i.e. Pralhadrao Lokhande – Witness of the Defendant No. 1 has admitted that the Plaintiff did not encroach upon the Plot No. 3.

The Defendants came up with the case that after the auction of the Plot No. 3 to Prakash Kakade, the Plaintiff has started the flour mill upon it by making encroachment which is contrary to the documents placed on record.

(9) By the Gram Panchayat's Resolution dated 12/12/1983, permission was granted to the Plaintiff to start the flour mill. Neither any notice was issued to the Plaintiff nor any Proceeding was initiated against the Plaintiff to remove the encroachment. In absence of any evidence on record against the Plaintiff that he has encroached upon the Government land, the act of the Defendants to dispossess the Plaintiff and to disconnect the electric supply is nothing but harassment to the Plaintiff at the hands of Government Authorities. There is ample evidence on record to show that the flour mill was erected in the year 1983. There are Gram Panchayat's Resolution, electric supply and tax receipts on record. As such, the flour mill was started with the valid permission of the Gram Panchayat. As such, there was no evidence on record at all to show that the Plaintiff encroached over the Plot No. 3 as alleged. Even the witness of the Defendants also remained silent on this issue. The learned Appellate Court failed to appreciate this fact that the Plaintiff has not sought any declaration of his ownership. Considering the apprehension to his settled possession that he is claiming restraint order, the learned Appellate Court held that though the Gram Panchayat's Resolution permitted the Plaintiff to install and run the flour mill, it does not prove the ownership of the Plaintiff over the Plot No. 3. The admission given by DW-1 Pralhadrao is described as mistaken admission, however, considering the evidence of Pralhad, he has admitted that the said construction of the flour mill is there for more than 10 years. He also admitted that in the document Harras Patti, proclamation and order of Tahsildar, there is no mention about the encroachment by the Plaintiff. Similarly, the boundaries of the plot are also not mentioned in the said Application. No case has been filed by the Department against the Plaintiff regarding the encroachment. Similarly, no notices were sent to him regarding the same. He admitted that the Plaintiff did not encroach upon the Plot No. 3. In view of this deposition, it cannot be described as mistaken admission.

(10) It is also admitted fact that the Plot No. 3 is not measured by the Measurer of the Nazul Department. In the cross-examination, this witness repeatedly deposed that there is no mention about the Plaintiff's encroachment upon the Plot No. 3 even in the Resolution by the Gram Panchayat. In view of this evidence on record, the learned Appellate Court totally erred in allowing the Appeal. True it is, the issue was framed by the learned Trial Court about the ownership, however, there is no declaration to that effect and only the Defendants were restrained from removing the flour mill of the Plaintiff as well as the Defendant No. 2 from disconnecting the electric supply.

(11) Learned Counsel for the Appellant relied on Smriti Debbarma (supra) wherein the Hon'ble Apex Court held that "A person in possession of land in the assumed character as the owner, and exercising peaceably the ordinary rights of

ownership, has a legal right against the entire world except the rightful owner.” As such, the Plaintiff, being in possession, would be entitled to protect and save his possession, unless the person who seeks to dispossess him has a better legal right in the form of ownership or entitlement to possession. In view of the evidence led by the Defendants, admittedly, there is no notice of encroachment given to the Plaintiff, and in view of the fact that the said flour mill of the Plaintiff is running legally and with the valid permission of the Gram Panchayat since 1983, there is no infirmity in the judgment passed by the learned Trial Court and the judgment passed by the learned Appellate Court is liable to be set aside. I, accordingly answer the substantial question of law in the affirmative and hold that the learned Appellate Court is wrong in placing burden on the Plaintiff even though admittedly the Plaintiff is in possession of the property.

(12) On going through the evidence led by the parties, I am satisfied that there is no procedure followed by the Government Officials and in view thereof, unnecessarily the Plaintiff is required to suffer for more than 25 years. As such, I am inclined to saddle costs on the Defendants.

(13) Hence, I proceed to pass following order:-

ORDER

(a) The Second Appeal is allowed.

(b) The judgment and order passed by the learned 2nd Ad-hoc Additional District Judge, Washim in Regular Civil Appeal No. 89/2001 dated 13/12/2005 is hereby quashed and set aside.

(c) The judgment and decree passed by the learned Civil Judge Senior Division, Washim in Regular Civil Suit No. 141/1997 dated 15/03/2000 is hereby confirmed.

(d) The Defendants shall pay costs of Rs. Ten Thousand to the Appellant – Plaintiff as a compensation within a period of one month from today.

(e) Decree be drawn up accordingly.

The Appeal stands disposed of in the above terms.

Pending Application(s), if any, stand(s) disposed of.