

PETITIONER:
PRATAPRAI N. KOTHARI

Vs.

RESPONDENT:
JOHN BRAGANZA

DATE OF JUDGMENT: 04/05/1999

BENCH:
M.Srinivasan, N Santosh Hegde, G T Nanavati,

JUDGMENT:

SRINIVASAN, J.

Though this litigation had a chequered career, the scope of the dispute between the parties is very limited. The respondent who was the plaintiff in Short-Cause Suit No.3120/81 on the file of the City Civil Court at Bombay prayed for a permanent injunction restraining the appellant herein from interfering with or disturbing his possession and occupation of the suit property situated in Malad (East) Bombay. A perusal of the plaint shows that the entire case of the respondent rested only on his exclusive possession for several decades and not on any claim of title. Though the respondent was not quite clear as to the origin of his possession, his continuous and exclusive possession from May 1964 under a registered lease deed was the basis of his claim. In the written statement filed by the appellant, while denying claim of the respondent, there was no specific plea that the appellant had title to the property and that the suit was not maintainable at the instance of the respondent. No doubt, there was an incidental reference to the appellant having become the owner of the property by virtue of a dissolution of a partnership which the appellant had entered with the alleged previous owner of the property. 2. The trial court framed as many as four issues. There was no issue regarding title. The crucial issue related to the plaintiff's possession of the suit property. The suit was decreed on 26.4.82 by the Additional Principal Judge. The appellant filed First Appeal No.479 of 1982. The plaintiff was permitted to amend the plaint and with the consent of the parties the First Appellate Court set aside the judgment of the trial court and remanded the matter for fresh disposal. The scope of the remand was however limited by the Appellate Judge who permitted the appellant herein to file additional written statement as against the amended plaint. The Appellate Judge had also recorded the agreement of the parties to the appointment of an architect as Commissioner in order to draw a sketch map showing the site in question together with the structures thereon as claimed by the plaintiff on the property in suit and the location of the structures. The Court directed that no additional evidence should be allowed accepting the evidence which may become consequential to the report of the Commissioner who may be examined as Court Witness if necessary. 3. Thus the scope of the remand having been expressly restricted, the

parties did not raise any question of title. The report filed by the architect-Commissioner was not seriously objected to by either party and after considering the entire evidence, the trial court passed a decree on 10.5.83 with regard to some portion of the suit property in favour of the plaintiff and dismissed the suit with regard to the rest. In Paragraph 90 of the judgment the trial Court stated thus:

"Before parting with the case I would like to make it clear that the relief granted to the plaintiff in this suit is based purely on the question of his possession and threat of his being dispossessed otherwise than by due process of law. The question of title of both the parties and their rights and remedies on the strength of title are left open including their rights in respect of those portions of the property in regard to which relief is granted in this suit."

4. Both the parties being aggrieved by the judgment and decree filed appeals before the High Court. The learned Single Judge of the High Court who heard the appeals started dictating the judgment on 10th August 1987 but thereafter he heard the parties again, recorded additional evidence and completed the rest of the judgment on 28.4.1989. The procedure adopted by the learned Judge has been pointed out to be "somewhat unusual" by the Division Bench whose judgment is now under appeal. In our opinion, the Division Bench has used a very mild expression to describe the course adopted by the learned Single Judge. In the course of delivering judgment for over a period of two years, the learned Single Judge had permitted additional evidence not only ignoring the provisions of Order XLI Rule 27 C.P.C., but also the limited scope of the suit in which there was no issue regarding title. Unfortunately, the learned Single Judge travelled outside the scope of the suit and over-looking the earlier order of remand passed by the High Court went on to record findings based on the alleged title of the appellant to the suit property. The summary of his conclusions is found in Paragraph 44 of his judgment which reads as follows:

"Let me summarise:

(i) The plaintiff has totally failed to prove his possession both of the structure and of the open space.

(ii) Even assuming that the plaintiff has proved possession of the structure on the date of the suit, he had badly failed to prove settled possession.

(iii) In case of open space, even such assumption is unconceivable.

(iv) The plaintiff is a rank trespasser whereas the defendant has fully established his title to the open space and to the land below the structure.

(v) Even assuming that the plaintiff was in possession of any portion of the suit property, his conduct, both before the date of the suit and in the court during the pendency of this litigation, fully disqualifies him from getting any injunction against the defendant. This position follows from the general principles of equity and from the necessary implications of Section 38 of the Specific Relief Act as also from the express bar of Section 41 (1) of the

said Act.

(vi) If not for any other reason, at least on account of the doctrine of law that possession follows title, the defendant must be held entitled to be in full possession of the open space.

(vii) The plaintiff must be held to be exposed to the charge of offence of forgery and perjury at least vis-a-vis the Receipt Ex.'B'.

5. Consequently learned Single Judge allowed the appeal of the appellant while dismissing the appeal of the respondent and dismissed the entire suit. That judgment of the Single Judge was challenged under the Letters Patent by the respondent before the Division Bench. After pointing out the limited scope of the suit, both before and after remand and the absence of any issue as to title, the Division Bench set aside the judgment of the Single Judge and restored that of the trial court after considering the entire evidence on record. It is that judgment of the Division Bench which is assailed before us by the appellant.

6. With all the vehemence at his command, the learned senior counsel for the appellant has urged the following contentions: (i) That the Letters Patent Appeal was not maintainable; (ii) That the suit of the respondent based merely on possession without any semblance of title was not maintainable against the appellant who is the owner of the property; (iii) The respondent having admitted the possession of the appellant prior to the suit in his notice could not have maintained the suit for injunction. 7. We are at a loss to appreciate how the appeal under Letters Patent was not maintainable. The learned counsel contended that the remedy of the respondent was to file a second appeal under Section 100 C.P.C. against the judgment of the learned Single Judge. However, he realised his folly when he read out Section 100 C.P.C. and found that it applied only to decrees passed in appeal by a Court subordinate to the High Court. There can be no doubt whatever that the judgment of the learned Single Judge of the High Court fell within the scope of Clause 15 of the Letters Patent and the appeal was maintainable. We have to point out that the question relating to the maintainability of the Letters Patent Appeal was not raised either before the Division Bench of the High Court or in the Special Leave Petition filed in this Court. 8. The second contention of the learned senior counsel is equally without any merit. He started by contending that the trial court had found categorically that the appellant had title to the property. He made an attempt to read certain passages from the judgment of the trial court to make good his contention. He could not succeed in doing so, particularly when the trial court had in Paragraph 90 of its judgment left open the issue of title as pointed out by us already. 9. Learned senior counsel drew our attention to a notice issued by respondent's advocates and solicitors to the appellant on 28.8.1990. In that notice reference was made to the appellant's construction of boundary wall unlawfully thereby obstructing the right of way of the respondent. A perusal of the notice only shows that what was referred to therein was only the interference with the possession of the respondent and the attempt on the part of the appellant to trespass on the suit property. There was no admission whatever on the part of the respondent that the appellant was in possession of any portion of the suit property.

There was no substance whatever in the said contention of the learned counsel. 10. Reliance was sought to be placed on the additional evidence admitted by the learned Single Judge during the pendency of the appeals to prove that the appellant had title to the property. It is settled law that in the absence of any plea, no evidence is admissible. The Single Judge of the High Court overlooked that when there was no plea or issue on the question of title, no evidence whatever was admissible regarding the same. He acted beyond his jurisdiction in permitting additional evidence to be filed in appeals. 11. We have already extracted the summary of conclusions arrived at by the learned Single Judge of the High Court. That shows that his conclusions were vitiated by his view that the appellant had title and possession followed title. It is quite obvious that the learned Single Judge had not taken note of the principle of possessory title or the principle of law that a person who has been in long continuous possession can protect the same by seeking an injunction against any person in the world other than the true owner. It is also well settled that even the owner of the property can get back his possession only by resorting to due process of law. 12. In the circumstances of the case, we do not find any merit whatever in this appeal and it is hereby dismissed with costs.