

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7318 OF 2015

Chandrakant Ramu Aswale : Petitioner
versus
Dattatraya Rama Aswale and anr. : Respondents.

Mr. P M Arjunwadkar for the Petitioner.
Mr. S S Kurade for the Respondent Nos.1 and 2.

CORAM : R. M. SAVANT, J.
DATE : 21st September 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 02/05/2015 passed by the learned District Judge-1, Gadhinglaj, Dist. Kolhapur by which order the Appeal filed by the Respondents herein came to be allowed and resultantly the order dated 04/03/2015 passed by the Trial Court allowing the Application (Exhibit 5) for temporary injunction filed by the Petitioner i.e. the original Plaintiff in Regular Civil Suit No.153 of 2010 came to be set aside, and resultantly the injunction came to be vacated.

2 The bone of contention between the Petitioner and the Respondent No.1 who are brothers is the property bearing Grampanchayat House No.831/1/2. On the ground that the Respondent No.1 herein i.e. the original Defendant No.1 to the suit is interfering with his possession that the suit in question being Regular Civil Suit No.153 of 2010 came to be filed by the

Petitioner. The said suit was filed simplicitor for injunction for restraining the Defendant No.1 from interfering with his possession. The Petitioner i.e. the original Plaintiff lays a claim to the suit property on the basis of a registered sale deed executed in his favour by one Shankar Shivappa Vali and Chandrashekhar Basappa Vali on 27/08/1976. The Plaintiff also seeks to support the claim by relying upon the mortgage deed dated 30/01/2006 executed by the Plaintiff in favour of one Janata Sahakari Bank Ltd, Ajara. On the other hand the Respondent No.1 in his defence has contended that the said property is the joint family property as being purchased out of the joint family corpus in the name of the Plaintiff. In the alternative it is the contention of the Respondent No.1 that the Respondent Nos. 1 and 2 have been bequeathed the said property by their father Ramu Aswale by his Will dated 10/12/2007.

3 In the said suit the Plaintiff filed an application for temporary injunction and has relied upon the registered sale deed as well as the mortgage deed executed by him in favour of Janata Sahakari Bank Ltd., Ajara to buttress his case that he is in possession of the property. The Respondent No.1 herein i.e. the original Defendant No.1 placed material by way of electricity bills and the payment of taxes in respect of the house structure in which he runs a hotel by name Vijayanand Hotel.

4 The Trial Court considered the said application for temporary

injunction and principally on the ground that the Plaintiff has a registered sale deed in his favour held that the documents produced by the Defendant No.1 would not aid the Defendant No.1 in proving his possession to the suit property. The Trial Court held that the Plaintiff had accordingly made out a case for grant of injunction and resultantly allowed the said application (Exhibit 5) for temporary injunction by its order dated 04/03/2015.

5 The aggrieved Defendants carried the matter in Appeal by filing Civil Misc. Appeal No.11/2015. The Lower Appellate Court as can be seen from the impugned order has adverted to an agreement which was executed between the Plaintiff and the Defendant No.1 which is dated 06/04/2010 by which they have agreed to divide the property which has been mentioned therein, on which the signature of the Plaintiff appears. The Lower Appellate Court held that the said document has not been considered in its proper perspective by the Trial Court. The Lower Appellate Court held that the Trial Court has also not considered the fact that the telephone bills were in the name of the Defendant No.1. The Lower Appellate Court came to a conclusion that on the basis of the material on record the possession of the Defendant No.1 in the area of the suit property wherein the hotel is being run by the Defendant No.1 cannot be disputed. The Lower Appellate Court therefore held that just because the Plaintiff has a sale deed in his favour, he cannot be assert his right in respect of the entire suit property. The Lower Appellate Court held ;that it is

well settled that an injunction cannot be issued against a co-owner. As indicated above the Lower Appellate Court by its impugned order dated 02/05/2015 has allowed the said Appeal and set aside the order of injunction granted by the Trial Court.

6 The learned counsel appearing on behalf of the Petitioner would contend that in the teeth of the registered sale deed dated 27/08/1976 the mortgage created by the Plaintiff in favour of Janata Sahakari Bank Ltd. Ajara dated 30/01/2006 as also the tax receipts in respect of the house in question, the Lower Appellate Court has erred in setting aside the order passed by the Trial Court granting injunction by merely relying upon the agreement dated 06/04/2010.

7 In my view, it is not possible to accept the contentions urged on behalf of the Petitioner. No doubt the Plaintiff has a registered sale deed dated 27/08/1976 in his favour and has also executed a mortgage deed in favour of Janata Sahakari Bank Ltd. Ajara dated 30/01/2006. However, the test is as to who is in possession on the date of filing of the suit. In the said context it is necessary to refer to the documents which have been produced on behalf of the Defendant No.1 in the form of electricity bills for the hotel in question as also the tax receipts issued by the Grampanchayat for the structure in question wherein the hotel is situated. If the said material is taken into consideration,

the same unmistakably leads a conclusion that it is the Defendant No.1 who is in possession of the part of the suit property which finding has been recorded by the Lower Appellate Court. The Lower Appellate Court has therefore set aside the order passed by the Trial Court for cogent reasons. Hence no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed Order.