

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.109 OF 2015
IN
WRIT PETITION NO.5789 OF 2011**

Gajanan Mahadeo Potdar

..Applicant

Vs.

Suhas Mahadeo Potdar & Ors.

..Respondents

Mr. Prathamesh Bargude for the Applicant

Mr. P. B. Shah for the Respondent Nos.1 to 3

CORAM : R. M. SAVANT, J.

DATE : 22nd SEPTEMBER, 2015

P.C.

1 The above Writ Petition was admitted by a Learned Single Judge of this Court (R. M. Borde J.) on 23-8-2011 and interim relief in terms of prayer clause (c) was granted. The said prayer clause (c) for the sake of ready reference is reproduced hereinunder:

“During the pendency of this Writ Petition interim protection granted by the Appeal Court on 10th June 2011 below Exh.33 may be continued.”

2 The grant of interim relief vide clause (3) is prefaced by the observations made by the Learned Single Judge in clause (2) which for ready reference is reproduced hereinunder:

“They were the purchasers of the joint undivided share of the member of the Joint Hindu Family. Strangers to the family cannot be permitted to be introduced to the joint share.”

The Learned Single Judge therefore has observed in clause (2) that the Defendant Nos.2 and 3 have purchased the undivided share belonging to the Defendant No.1 pending the litigation. In fact the application for temporary injunction which was rejected by the Trial Court was allowed by the Lower Appellate Court. However, in view of the ambiguity in the order passed by the Lower Appellate Court an application was required to be placed before the Lower Appellate Court for clarifying the said order which the Lower Appellate Court has clarified vide its order dated 9-6-2011 to mean that the application Exhibit 5 filed for temporary injunction by the father of the Plaintiff and the Defendant No.1 was allowed and the Defendant No.1 was enjoined from dealing with the property in question as also from interfering with the possession of the Plaintiff. The Learned Single Judge has also observed that the Defendant Nos.2 and 3 are the purchasers of the joint undivided share of the member of Hindu Joint Family. It is further observed that the strangers to the family cannot be permitted to be introduced to the joint share and that they would be entitled to file separate Suit for partition and possession and can claim their entitlement to the share which can be allotted to their predecessor in title.

3 The cause for moving the above Civil Application in the pending Petition was the alleged interference by the Respondent No.1 to the Petition in the possession of the Applicant /Petitioner. In the above Civil Application, the

substantive relief sought is by way of prayer clause (a) which reads thus :

“(A) That this Honourable Court be pleased to issue a temporary injunction restraining to the Respondent herein from disturbing the possession of the Applicant herein in respect of the suit property viz the property described in paragraph No.8 of this Civil Application by clarifying the order passed by this Honourable Court (Coram :- R. M. Borde J) dt. 23rd August 2011 in Writ Petition No.5789 of 2011.”

Prayer clause (B) which is seeking police aid can be said to be only consequential to prayer clause (A). Since the Learned Single Judge who passed the order dated 23-8-2011 is not available at the Principal Seat that the above Civil Application is placed before this Court for clarifying the order dated 23-8-2011. In the context of the clarification sought a few facts would have to be revisited.

4 It is required to be noted that one Mahadeo Potdar filed a Suit being Regular Civil Suit No.14 of 2005 against his 4 sons for declaration and injunction. The said Mahadeo was constrained to file the Suit in view of the fact that since lands were purchased in the names of his four sons and since the Defendant No.1 was seeking to deal with the property in question which was purchased in his name, that the Suit was required to be filed. In the said Suit, an application for temporary injunction Exhibit 5 came to be filed. Suffice it would be to state that the said application for temporary injunction came to be rejected by the Trial Court by order dated 16-4-2005. The said Mahadeo filed

Misc Civil Appeal No.41 of 2005 aggrieved by the rejection of the application for temporary injunction. The said Appeal came to be allowed and the order passed on Exhibit -6 (wrongly referred to as such instead of Exhibit 5), came to be set aside. However the sequitur to setting aside the said order was remained to be mentioned in the operative part of the said order. In view of the ambiguity in the said order, the Plaintiff and the Defendant No.1 both filed Writ Petitions in this Court being Writ Petition No.1734 of 2007 filed by the Plaintiff Mahadeo and Writ Petition No.676 of 2007 filed by the Defendant No.1 Suhas Potdar. The said Writ Petitions came to be disposed of by this court by permitting the Plaintiff to file an application for seeking clarification and directing the Lower Appellate Court to consider the said application. The Lower Appellate Court considered the said Misc Application No.3 of 2011 filed by the Plaintiff Mahadeo and allowed the same and modified the order dated 21-8-2006 by supplying the omission namely that Exhibit 5 i.e. the application for injunction would stand allowed. Hence the application for injunction filed by Mahadeo stood allowed albeit by an order passed on 9-6-2011. However, it is required to be borne in mind that the said order dated 9-6-2011 clarifies the order dated 21-8-2006. In so far as the order dated 21-8-2006 is concerned, it is an undisputed position that the order passed on the application Exhibit 5 was set aside and the application Exhibit 5 came to be allowed. Hence the first round ended by the clarification issued by the Lower Appellate Court by its order dated 9-6-2011.

5 In view of the fact that the Defendant No.1 had executed two Sale Deeds on 18-10-2010 covering the properties which were purchased in his name on 7-9-2009. An application came to be filed by the Plaintiff Gajanan Potdar for transposing himself as the Plaintiff in the Suit filed by his father Mahadeo Potdar as the said Mahadeo Potdar expired on 18-10-2007. The said application Exhibit 82 filed for transposition was allowed by the Trial Court and Gajanan Potdar was accordingly transposed as the Plaintiff. The challenge to the said transposition failed as the Writ Petition filed by the Defendant No.1 i.e. Writ Petition No.8269 of 2010, came to be dismissed by a Learned Single Judge of this Court on 14-3-2011. The said Gajanan thereafter filed his own Suit being Regular Civil Suit No.97 of 2009 for declaration and injunction. The declaration was sought was in respect of the Sale Deeds which were executed by the Defendant No.1 in favour of the Defendant Nos.2 and 3. The injunction sought was for restraining the Defendants from interfering with the Plaintiff's possession in respect of the suit property. The application for injunction came to be rejected by the Trial Court by order dated 23-12-2010. The rejection was principally on the ground of the entries made in the 7/12 extract which disclosed that the name of the Plaintiff is appearing in respect of 3/4th share in the land in question whereas the name of the Defendant No.1 i.e. Respondent No.1 herein is appearing in respect of 1/4th share in the land in question. However, in so far as the Defendant Nos.2 and 3 are concerned, it is significant

to note that the Trial Court in paragraph 16 has made the following observations. The relevant excerpt is as follows:

“In view of observations in the citation relied upon by learned Counsel for Plaintiff which is cited supra they cannot claim their possession in suit properties until co-sharers partition the suit properties by metes and bounds”

The Trial Court therefore held that the Defendant Nos.2 and 3 who have purchased the share of the Defendant No.1 cannot claim possession of the property by metes and bounds.

6 Against the rejection of the application for temporary injunction, the Plaintiff filed Misc Civil Appeal No.6 of 2011. However, since the order of status-quo was operating in the Suit which was passed on 11-9-2009, the Lower Appellate Court continued the order of status-quo pending the Appeal. The Appeal came to be dismissed by the Lower Appellate Court by judgment and order dated 9-6-2011. However, the order dated 5-1-2011 passed by it i.e. the order of status-quo was continued for a period of one month, thereafter the instant Petition was filed by the Plaintiff challenging the orders passed by the Trial Court as well as the Lower Appellate Court. In so far as the Lower Appellate Court is concerned, it confirms the order passed by the Trial Court, hence the observations of the Trial Court that the Defendant Nos.2 and 3 cannot claim their possession unless the co-sharers partition the property amongst themselves continues to operate.

7 The above Petition as indicated above had come up for admission on 23-8-2011 when a Learned Single Judge of this Court (R. M. Borde J.) has admitted the above Petition and granted interim relief in terms of prayer clause (c). The said aspect has already been referred to in the earlier part of this order. In the context of the clarification sought in the above Civil Application, it is required to be noted that in the first round i.e. the Suit filed by the father of the Plaintiff against the Defendant No.1 Suhas Potdar, the Lower Appellate Court allowed the application for temporary injunction filed by the Plaintiff by issuing the clarification dated 21-8-2006. There can be no dispute about the fact that the order passed rejecting the application for temporary injunction was set aside which was to the knowledge of both the parties. Hence inspite of the order passed by the Trial Court rejecting the application being set aside by the Lower Appellate Court by order dated 21-8-2006, the Defendant No.1 had chosen to execute two Sale Deeds in favour of the third parties on 7-9-2009. This can obviously attributed to the fact that the endeavour appears to be to frustrate the Suit filed by the Plaintiff.

8 Now coming to the Suit filed by the Plaintiff Gajanan Potdar, it is required to be noted that though the application for temporary injunction was rejected by the Trial Court, the Trial Court has made observations in paragraph 16 which have been referred to hereinabove. The said observations therefore

impinge upon the claim of the Defendant Nos.2 and 3 being put in possession of the specific portion of the suit property by the Defendant No.1. The Learned Single Judge of this Court who pass the order on 23-8-2011 has adverted to the aforesaid aspects and has also observed that the Defendant Nos.2 and 3 who are the strangers obviously cannot be allowed to inter meddle with the Suit property and remedy is for them to file a separate Suit for partition seeking possession. The upshot of the aforesaid discussion would be that the the Defendant Nos.2 and 3 are restrained from disturbing the possession of the Plaintiff in respect of the suit property. Hence by issuing the clarification as aforesaid, the Civil Application is disposed of.

9 In view of the fact that the Suits are of the year 2005 and 2009 and since a Learned Single Judge of this Court has already observed that the pendency of the above Petition and the earlier Petition would not be an impediment for the Trial Court to proceed with the Suit. The hearing of the Suit is expedited.

10 At this stage, the Learned Counsel for the Applicant seeks stay of the instant order. In the facts and circumstances of the case, the said prayer is refused.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order