

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5652 OF 2015

Baban Balu Chavan (decd) through LRs
Hanumant Baban Chavan and others ... Petitioners
Vs.
Kashinath Pandurang Bandal and another ... Respondents

Mr. Uday P. Warunjikar for Petitioners.
Mr. Vishwanath S. Talkute for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 30TH JULY, 2015

P.C. :

Heard Mr. Warunjikar, learned Counsel for petitioners and Mr. Talkute, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the judgment and order dated 11.03.2015 passed by the learned District Judge-4, Satara in Miscellaneous Civil Appeal No.43 of 2014. By that order, the learned District Judge allowed the Miscellaneous Civil Appeal preferred by the respondents, hereinafter be referred to as plaintiffs, and allowed exhibit-5 filed by them. The learned District Judge issued injunction restraining the defendants from disturbing plaintiffs' possession over the suit property till the decision of the Suit.

3. In support of this Petition, Mr. Warunjikar submitted that plaintiffs claim to have purchased 3 Acres 5 Gunthas from Gat No.30 in all admeasuring 7 Hectares 21 Ares plus Pot Kharaba 86 Ares. He submitted that in fact plaintiffs have purchased 1 Acre 30 Gunthas by registered sale deed dated 06.09.1969. In other words, plaintiffs cannot claim injunction in respect of area exceeding 1 Acre 30 Gunthas. He

submitted that the proceedings were initiated challenging the mutation entry No.522. The Circle Officer, Shirval passed order on 31.12.1997 in respect of the mutation entry. Aggrieved by that decision, plaintiffs preferred Revision before the S.D.O., Wai, Sub-division Wai. Revision Application was dismissed by the S.D.O. on 19.01.2013. Aggrieved by that decision, plaintiffs preferred Appeal before the Additional Collector, Satara, which was also dismissed. He submitted that in the written statement, defendants have specifically asserted that under the sale deed dated 16.09.1969, plaintiffs have purchased only 1 Acre 30 Gunthas. Defendants have further asserted that they have never threatened plaintiffs and in fact, there is no cause of action for instituting the Suit. He submitted that in any case, defendants are the co-owners. Plaintiffs cannot claim injunction against the co-owners and their remedy is to institute Suit for partition. The learned trial Judge rightly rejected the application on 20.02.2014. The learned District Judge, however, interfered with the discretion exercised by the learned trial Judge. He, therefore, submitted that Petition requires consideration and the impugned order is required to be stayed.

4. On the other hand, Mr. Talkute supported the impugned order. He submitted that the learned trial Judge also recorded a finding that plaintiffs are in possession of the suit property, namely 3 Acres 5 Gunthas. He submitted that defendants did not file cross-objections in the appeal filed by the plaintiffs insofar as the finding recorded by the trial Court in respect of possession is concerned. He submitted that the Courts below, after considering the material on record as also the recitals in the sale deed, came to the conclusion that plaintiffs have established prima facie case of possession. The learned trial Judge though found that the plaintiffs are in possession of the suit property, rejected the application only on the ground that there was no clear threat or danger to

the plaintiffs' possession. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiffs have filed Suit for perpetual injunction restraining defendants from obstructing their possession in respect of the suit property. In paragraph 1, plaintiffs have claimed that the suit property admeasures 3 Acres 5 Gunthas out of Gat No.30 in all admeasuring 7 Hectares 21 Ares plus Pot Kharaba 86 Ares. Plaintiffs have also given boundaries of the suit property. The learned trial Judge, after considering the material on record, held that prima facie, so far as possession is concerned, plaintiffs have successfully established their possession over the suit property. The learned trial Judge, however, observed that there is no threat to the settled possession of the plaintiffs as the parties are battling in the revenue proceedings as also there is no clear cut threat to the plaintiffs' possession over the suit property. The learned trial Judge held that though prima facie case was made out, no irreparable loss or injury or prejudice will be cause to the plaintiffs. The balance of convenience also does not lie in favour of the plaintiffs.

6. As against this, the learned District Judge has observed in paragraph 7 that the learned trial Judge also held that plaintiffs have established their possession but injunction was refused only on the ground that there was no apprehension of dispossession. The learned District Judge considered the revenue proceedings as also criminal complaints were lodged against each other. In paragraph 8, the learned District Judge observed that the only controversy in the matter was in respect of any apprehension / threat to the plaintiffs' possession. After

considering the material on record, the learned District Judge observed that defendants are disputing the ownership of the plaintiffs in respect of the area admeasuring 3.5 Acres. That itself can be equated with the apprehension / threat. The learned District Judge accordingly allowed the Appeal. It is material to note that defendants did not file cross-objections against the findings recorded by the learned trial Judge in respect of the possession of the plaintiffs. It is, therefore, not open now to the defendants in this Petition to urge that plaintiffs are not in possession of the suit property admeasuring 3.5 Acres. With the assistance of the learned Counsel appearing for the parties, I have perused the recitals of the sale deed. Recitals in the sale deed prima facie indicates that in case the area purchased by the plaintiffs is found to be in excess of 1 Acre 30 Gunthas, the same shall belong to the plaintiffs. It is also material to note that in case of inconsistency between the area and boundary, it is settled position of law that the boundary will prevail. As far as the plea that injunction cannot be granted against co-owner is concerned, no such plea was taken in the Say to injunction application and written statement. It was also not agitated before the Courts below. It is, therefore, not open to defendants to raise this contention for the first time in this Court. Considering the totality of the circumstances, I do not find that the learned District Judge has committed any error in allowing the Appeal. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Liberty is reserved to the parties to apply for expeditious disposal of the Suit. If such application is taken out, the learned trial Judge will pass appropriate order. The learned trial Judge will decide the Suit uninfluenced by the observations made herein.

(R. G. KETKAR, J.)