

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7281 OF 2015

Kashiram Laxman Sapte and another ... Petitioners
Vs.
Dhavaji Mukunda Sapte and others ... Respondents

Mr. Tushar N. Sonawane for Petitioners.
Ms Smita R. Gaidhani for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 10TH AUGUST, 2015

P.C. :

Heard Mr. Sonawane, learned Counsel for petitioners and Ms Gaidhani, learned Counsel for respondents at length. Rule. Ms Gaidhani waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the judgment and order dated 22.06.2015 passed by the learned Ad-hoc District Judge-1, Nashik in Miscellaneous Civil Appeal No.83 of 2014. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as plaintiffs, and quashed and set aside the judgment and order dated 04.07.2014 passed by the learned 8th Joint Civil Judge, Junior Division, Nashik below exhibit-5 in Regular Civil Suit No.571 of 2013 and allowed the application exhibit-5 filed by the plaintiffs and issued injunction restraining defendants No.1 and 2 from causing any obstruction to the possession of plaintiffs over Gat No.127 till the final disposal of the Suit.

3. In support of this Petition, Mr. Sonawane submitted that in paragraph 11 of the plaint, plaintiffs specifically asserted that in the revenue records, oral partition effected between Kashi Sura and Dhavalu Sura in 1930-31 was recorded. As per that partition, name of Dhavalu Sura was deleted from Gat No.127. Deepa, son of Kashi Sura died during the lifetime of his father. After the death of Kashi Sura, the name of his grandson namely Chima Deepa was entered in the revenue record. Chima Deepa was bachelor. After the death of Chima Deepa in the year 1979, names of defendants were entered in the revenue record. Mr. Sonawane submitted that in view of the assertions made in paragraph 11 itself, it is evident that the names of defendants are recorded in the revenue record. He submitted that the application taken out by the plaintiffs exhibit-5 was rejected by the learned trial Judge after considering the entries in the revenue record. In paragraph 11, the learned trial Judge observed that on perusing 7/12 extract in respect of Gat No.127, it is evident that since 1999 till 2012, it is in possession of defendant No.1-Kashiram. The learned trial Judge accordingly rejected exhibit-5. The learned District Judge however, ignoring 7/12 extracts, considered affidavits of adjoining landholders and interfered with the discretion exercised by the learned trial Judge. He submitted that the learned District Judge committed error in interfering with the order of the trial Court. In support of this submission, he relied upon the decision of the Apex Court in the case of *Wander Limited and another Vs. Antox India Private Limited*, 1990 (Supp.) SCC 727.

4. On the other hand, Ms Gaidhani supported the impugned order. She submitted that in paragraph 6 of the plaint, plaintiffs specifically asserted that some time in June - July 2013, defendant No.1 obstructed plaintiffs in cultivating the crops in Gat No.127 and also gave threats to them. Gat No.127 is in possession of the plaintiffs and since many

years, plaintiffs are cultivating the said land. In paragraph 7, plaintiffs asserted that after perusing the entries and extracts of revenue record, plaintiffs realized that only name of defendant No.1 is entered in the revenue records of Gat No.127. Defendant No.1 is taking undue advantage of the said fact and is trying to dispossess the plaintiffs. In short, she submitted that plaintiffs are cultivating the suit land since many years. She also invited my attention to paragraph 24 of the written statement wherein defendants contended that from 12.08.2010, defendant No.1 Kashiram is in possession of the suit land and is taking various crops. She submitted that defendants themselves came with the case that they are in possession of the suit land right from 2010 and not in earlier point of time. The learned District Judge was justified in interfering with the order passed by the trial Court as the trial Court failed to take into account affidavits of adjoining landholders. She submitted that while deciding Application for injunction under Order 39, Rules 1 and 2 of C.P.C., the Court is justified in taking into account the affidavits of the adjoining landholders.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, in paragraph 11 of the plaint, plaintiffs themselves asserted that in the revenue record, the oral partition effected between Kashi Sura and Dhavalu Sura in 1930-31 was recorded. In pursuance of that oral partition, name of Dhavalu Sura was deleted from Gat No.127. During the lifetime of Kashi Sura, his son Deepa expired. After the death of Kashi Sura, the name of his grandson namely Chima was recorded as owner. Chima died bachelor and names of defendants were entered in the revenue record. Though plaintiffs asserted in paragraph 6 of the plaint that they are cultivating the suit land since many years, prima facie, no particulars are given since when they are

cultivating the suit land. It is contended that in June-July 2013, defendants started obstructing the plaintiffs from cultivating the suit land. In paragraph 7, plaintiffs asserted that recently they became aware of entry of defendant No.1 alone in the revenue record. Prima facie, in the light of the assertions made in paragraph 11 of the plaint, the case made out by the plaintiffs in paragraphs 6 and 7 cannot be accepted. That apart, the learned trial Judge, while rejecting the application, has observed in paragraph 11 that right from 1999 till 2012, the name of the defendant No.1 appears in 7/12 extract and therefore, prima facie, defendant No.1 is in possession of the suit land.

6. Ms Gaidhani submitted that in paragraph 74 of the written statement, defendants contended that from 12.08.2010, Kashiram is in possession of the suit land. It is not in dispute that plaintiffs have instituted Suit on 12.09.2013. The plaintiffs have not shown as to how and when defendant No.1 handed over possession to them. In other words, on the date of the Suit, defendant No.1 is in possession.

7. In the case of **Wander Limited** (*supra*), the Apex Court has observed in paragraph 14 as under:

“14., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these

principles Gajendragadkar, J. in *Printers (Mysore) Private Limited Vs. Pothan Joseph*, (1960) 3 SCR 713, (SCR 721)

“...These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. V. Jhanton*, 1942 AC 130' ... the law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'.”

6. In paragraph 14, extracted hereinabove, the Apex Court has held that in appeal the appellate Court will not interfere with the exercise of discretion of the lower Court and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

7. In the light of the aforesaid test, if the appellate Court's judgment is perused, it has to be held that the learned District Judge ignored the 7/12 extract as also the case set up by the plaintiffs in paragraph 11 of the plaint. The learned District Judge relied upon the affidavits of the adjoining landholders and ignored the relevant and material piece namely, 7/12 extract, which even on the plaintiffs' own showing stands

in the name of the defendant No.1. The learned District Judge totally misdirected himself and exceeded the limitations imposed upon him. In view thereof, impugned order cannot be sustained and is liable to be set aside. Rule is made absolute in terms of prayer clause (b) and application exhibit-5 stands dismissed.

8. It is made clear that these observations are tentative for deciding exhibit-5. The learned trial Judge will decide the Suit on the basis of evidence on record and in accordance with law and independently and uninfluenced by the observations made in this order. Liberty is reserved to the plaintiffs to apply for expeditious disposal of the Suit. If such application is taken out, the learned trial Judge will pass appropriate order thereon. Order accordingly.

(R. G. KETKAR, J.)

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