

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8144 OF 2015

Kasturba Raishi Shah through her PoA Shajay Shah ... Petitioner
Vs.
Jamnabhen Zaverchand Shah and others ... Respondents

Ms Prabha U. Badadare for Petitioner.
Mr. Ramesh L. Majgaonkar for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 14TH AUGUST, 2015

P.C. :

Heard Ms Badadare, learned Counsel for the petitioner and
Mr. Majgaonkar, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 07.07.2014 passed by the learned 2nd Joint Civil Judge, Junior Division, Bhiwandi below exhibit-5 in Regular Civil Suit No.457 of 2013 as also the judgment and order dated 29.06.2015 passed by the learned District Judge-11, Thane below exhibit-22 in Miscellaneous Civil Appeal No.14 of 2015. By these orders, the Courts below dismissed the application-exhibit 5 taken out by the petitioner, hereinafter referred to as the plaintiff, for injunction restraining defendants from disposing of the land bearing Survey No.95, Hissa No.12/P/2 admeasuring 1556 sq.yards and house No.173 along with power-looms situate at Sonibai Compound, Narpoli, Bhiwandi, District Thane (for short 'suit property').

3. In support of this Petition, Ms Badadare submitted that the respondents, hereinafter referred to as defendants, relied upon application dated 25.04.1987 purportedly made by the plaintiff for

deleting her name. They are also relying upon the statement dated 20.04.1987 purportedly made by the plaintiff. She submitted that as the application was made on 25.04.1987, it is inconceivable that the plaintiff would make statement on 20.04.1987 that is to say, prior to making of that application. She further submitted that defendants came with the case that oral family settlement was entered into and that was reduced in writing in the year 1989. She submitted that she is not signatory to the family settlement. The said document cannot be used against the plaintiff as she has not signed the said document. In short, she submitted that the said family settlement is not binding on the plaintiff and in any case that is a forged document. Lastly, she submitted that mutation entry No.1739 was certified on 25.05.1986 when the Vardi Application was given on 20.04.1987. On the other hand, Mr. Majgaonkar supported the impugned order.

4. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. The learned trial Judge has considered the material on record and in paragraphs 15 and 16, the learned trial Judge observed that mutation entry No.1739 was made in the year 1987. Till the year 2013, plaintiff did not challenge the mutation entry. Plaintiff filed R.T.S. Revision No.120 of 2013 before the Sub Divisional Officer, Bhiwandi, who rejected the application on 10.02.2014.

5. In paragraph 16, the learned trial Judge observed that mutation entry has a presumptive value. Perusal of mutation entry shows that notices were served and there was no dispute about service of notice. The mutation entry was certified.

6. In paragraph 17, the learned trial Judge considered averments

made in paragraph 2 of the plaint that house No.173 stands in the name of the plaintiff as owner as per the municipal record. Whereas the municipal assessment produced for the year 2012-2013 shows name of Mr. Zaverchand Shah. The learned trial Judge accordingly rejected the application.

7. As far as the appellate Court is concerned, the learned District Judge held that the plaintiff did not make out a prima facie case; balance of convenience does not lie in favour of the plaintiff and that no hardship will be caused to the plaintiff in case the injunction is refused. The learned District Judge also considered the statement made by the plaintiff before Talathi on 20.04.1987 as also the mutation entry No.1739 duly certified on the basis of the statement made by the plaintiff.

8. The Courts below, after considering the material on record, have concurrently held that the plaintiff did not make out a prima facie case as also balance of convenience lies in favour of the defendants and no irreparable injury will be caused to the plaintiff. In the case of *Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727*, the Apex Court in paragraph 14 has observed as under:

“....., 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'.”

9. After considering the material on record, the Courts rejected the application. It cannot be said that the orders are perverse being based upon no material or are contrary to material on record. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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