

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

WRIT PETITION NO.10758 OF 2014

Vithoba Alias Vitthal Vishnu Bhujbal : Petitioner
versus
Murlidhar Bhau Bhujbal and ors. : Respondents.

Mr. N R Bubna for the Petitioner.
Mr. P S Dani, Senior Advocate, with Mr. Vilas B Tapkir for the Respondent
Nos.1 to 4.

CORAM : R. M. SAVANT, J.
DATE : 05th January 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 29/04/2014 passed by the learned District Judge-9 Pune by which order the Appeal being Misc. Civil Appeal No.204 of 2013 filed by the Petitioner i.e. the original Defendant came to be dismissed and the order dated 4/4/2013 passed by the Trial Court i.e. the learned Joint Civil Judge, Junior Division, Ghodnadi (Shirur) allowing the Application (Exhibit 5) came to be confirmed. Hence there is a concurrent finding recorded against the Petitioner i.e. the original Defendant and in favour of the Plaintiff No.4 i.e. the Respondent No.4 herein i.e. Mangla Shantaram Dorage as regards her entitlement to the discretionary relief of temporary injunction.

2 The suit in question being Regular Civil Suit No.36 of 2013 has been filed by the Plaintiffs i.e. the Respondents herein for partition and

injunction in respect of the properties bearing Gat No.186 admeasuring 1 H. 67 Ares situated at village Takali Bhima, Gat No.1960 admeasuring 26 Ares, Gat No.1963 admeasuring 1 H. 86 Ares, Gat No.1909 admeasuring 1 H. 27 Ares, Gat No.1925 admeasuring 1 H. 60 Ares, 1921 admeasuring 1 H. 65 Ares and Gat No.1908 admeasuring 4 H. 94 Ares all situated at village Talegaon Dhamdhere. The said properties are claimed to be ancestral properties of the Plaintiff No.1 and the Defendant. However, in so far as the present Application (Exhibit 5) for temporary injunction is concerned, the same was filed by the Plaintiff No.4 and was restricted to the suit property bearing Gat No.186 admeasuring 1 H. 67 Ares. The said property has been purchased by the Plaintiff No.4 from the Plaintiff Nos.1 to 3 vide sale deed dated 27/12/2006. The present proceedings have been preceded by Regular Civil Suit No.173 of 2000 filed by the Respondent No.1 herein in the Court of the learned Civil Judge Junior Division, Ghodnadi (Shirur). The said suit was filed simplicitor for injunction. The said suit came to be decreed and the Defendant was held to be entitled to 1/3rd share whereas the Plaintiff Nos.1 to 3 were held to be entitled to 2/3rd share. The said decree came to be challenged by the Defendant i.e. the Petitioner herein by filing Regular Civil Appeal No.542 of 2006. The said Appeal came to be allowed on 3/11/2012. Against the said judgment of the Lower Appellate Court, the Plaintiffs filed Second Appeal No.5 of 2013 in this Court, however, on the application of the Plaintiff No.4 i.e. the Respondent No.4 herein the said Second Appeal was permitted to be

withdrawn with liberty to the Plaintiff No.4, who is the purchaser from the Plaintiff Nos.1 to 3, to adopt appropriate proceedings. It is thereafter that the instant suit has been filed by the Plaintiff No.4 for asserting her rights on the basis of the sale deed executed by the Plaintiff Nos.1 to 3. The said suit as indicated above has been filed for partition and injunction. The Plaintiff Nos.1 to 3 have joined the Plaintiff No.4 in filing the instant suit.

3 In the instant suit the Plaintiff No.4 filed the Application (Exhibit 5) for injunction restraining the Defendant from interfering with her possession in respect of the property i.e. Gat No.186 which is the suit property No.1 as described in the plaint. In support of her contention that she is in possession, the Plaintiff No.4 relied upon plethora of documents viz. 7x12 extracts, extract in Form 8A, electricity bill, photographs as well as the sale deed. The Plaintiff No.4 also relied upon the orders passed in Regular Civil Suit No.173 of 2000, in Regular Civil Appeal No.542 of 2006 and the order passed in Second Appeal No.5 of 2013. The Defendant on the other hand relied upon the application for temporary injunction in Regular Civil Appeal No.542 of 2006 as well as the reply filed by the Plaintiff No.4 therein and the pursis filed by the Plaintiff No.4 in the First Appeal in which pursis she has stated that though she is carrying on the construction, she would not claim equity on the said basis and would remove the construction and hand over the possession in the event the suit is decreed in favour of the Defendant.

4 The Trial Court considered the said Application (Exhibit 5) and has by its order dated 4/4/2013 allowed the said Application. The Trial Court on the basis of the material on record held that prima facie it is the Plaintiff No.4 who is in possession of the property and has cultivated the suit property and her standing crops are there in the suit property along with a constructed house of 1200 sq.ft. over it. The Trial Court adverted to the fact that it is the Defendant's own theory that he has been ousted from the suit property at the time of judgment in Regular Civil Suit No.173 of 2000. The Trial Court was therefore of the view that the rights of the Plaintiff No.4 would have to be protected by way of an order of temporary injunction pending suit. The Trial Court as indicated above accordingly allowed the Application (Exhibit 5) by its order dated 4/4/2013.

5 The Defendant aggrieved by the said order dated 4/4/2013 filed Misc. Civil Appeal No.204 of 2013. The Lower Appellate Court on a re-appreciation of the material on record did not find any reason to interfere with the discretion exercised by the Trial Court. The Lower Appellate Court confirmed the finding of the Trial Court in so far as the possession of the Plaintiff No.4 is concerned. The Lower Appellate Court thereby confirmed the finding of the Trial Court that the Plaintiff No.4 is in possession since the year 2006. The Lower Appellate Court has accordingly dismissed the said Appeal by

the impugned order.

6 The learned counsel Shri Bubna appearing on behalf of the Petitioner i.e. the original Defendant would contend that in view of the finding recorded in Regular Civil Appeal No.542 of 2006, the Trial Court as well as the Lower Appellate Court had erred in granting and confirming the injunction. The learned counsel for the Petitioner would contend that in Regular Civil Appeal No.542 of 2006 the Lower Appellate Court has observed that the Plaintiff No.1 is not in possession of the suit property. The Lower Appellate Court would also contend that the Trial Court as well as the Lower Appellate Court have erred in taking into consideration the theory of ouster.

7 In my view, it is not possible to accept the said contention urged on behalf of the Petitioner. In so far as earlier round of litigation is concerned, the said suit being Regular Civil Suit No.173 of 2000 was filed for perpetual injunction. What is required to be noted is that the Second Appeal No.5 of 2013 was withdrawn with liberty to the Plaintiff No.4 to adopt appropriate proceedings to assert her rights. It is pursuant to the said liberty granted, that the Plaintiff No.4 has filed the instant suit wherein the Plaintiff Nos.1 to 3 have joined Plaintiff No.4 for claiming the relief of partition. It is trite that a purchaser of an undivided share in a joint family property has to sue for partition. It is in the said context the Plaintiff No.4 has filed the instant suit.

In support of her contention that she is in possession, the Plaintiff No.4, as indicated above, has produced a plethora of documents on the basis of which the Courts below have recorded a finding of fact that it is the Plaintiff No.4 who is in possession. In my view, no fault can be found with the said conclusion arrived at by the Courts below at the prima facie stage. In so far as the theory of ouster which has been taken into consideration by the Courts below is concerned, it is required to be noted that if the Defendant was aggrieved by the observation made by the Courts below to the effect that it is the Defendant's own theory that he has been ousted, he ought to have applied to the Courts below in respect of the said observation and cannot make a grievance in a higher Court as regards the said observation. Hence this court would have to go by the record which indicates that there is an admission of ouster by the Defendant. In the light of the facts as afore-stated, the exercise of discretion by the Courts below cannot be found fault with. Hence no case for interference in the writ jurisdiction of this Court is therefore made out. The above Writ Petition is accordingly dismissed. However in the facts and circumstances of the case, the hearing of the suit in question is expedited.

[R.M.SAVANT, J]