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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11728 OF 2015

Maruti Ganpat Badekar

Deceased through heirs

Pandurang R.Kotkar

Deceased through heirs

a) Sharmila Pandurang Kotkar and others ... Petitioners

Vs.

Shri Jayprakash Ramesh Gantelu

deceased through heirs

a. Sow.Sheetal Zubin Tawadia and another ... Respondents

Mr.Pralhad Paranjape, Advocate for petitioners.

CORAM : R.G.KETKAR, J.

DATE : 05th DECEMBER, 2015

P.C. :

. Heard Mr.Pralhad Paranjape, learned Counsel for the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.2 has challenged the judgment and order dated 24/08/2015 passed by the learned joint Civil Judge, Junior Division, Vadgaon Maval below Exhibits 241 & 237. Application at Exhibit 237 is filed by petitioners, hereinafter referred to as original defendant No.2, for striking out defence of the plaintiffs to counter claim set up by defendant No.2 on the ground of breach of injunction order passed by the trial Court on 03/11/1995 below Exhibit 53. Defendant No.2 thereafter filed application

Exhibit 241 for recalling order dated 16/07/2015. That application was allowed and application Exhibit 237 is rejected by the learned trial Judge. Insofar as rejection of the application Exhibit 237, the defendant No.2 has instituted the present proceedings.

3. Mr.Paranjape submitted that respondent No.1 – Jaiprakash Ramesh Gantelu, since deceased and respondent No.2 – Ms.Neena Jayprakash Gantelu, hereinafter referred to as plaintiffs, have instituted Regular Civil Suit No. 103 of 1994 for perpetual injunction against the petitioners. The plaintiffs took out application for temporary injunction restraining the defendants from obstructing their peaceful possession. By order dated 26/07/1994 that application was dismissed. The defendants thereafter took out application Exhibit 53 for temporary injunction restraining the plaintiffs from entering in room No. 2 of the suit house and from carrying out any construction in the suit house till the disposal of the Suit. By order dated 03/11/1995, the learned trial Judge allowed the application and issued injunction restraining the plaintiffs from entering in room no. 2 of the suit house and from carrying out any construction in the suit house till disposal of the Suit. He submitted that the said injunction order is operating till today. The defendants have filed written statement in November 1999 resisting the Suit. In paragraph 3 of the written statement, it is asserted that despite injunction order dated 03/11/1995, plaintiffs demolished portion of

room No.2 and took unlawful possession. They have also set up counter claim inter alia praying for declaration that defendants are co-owners and for recovery of possession of room No.2 from plaintiffs.

4. He submitted that on behalf of the plaintiffs, plaintiff No.2 -Ms.Nina Jayprakash Gantelu filed her affidavit in lieu of examination-in-chief. In paragraph 3, she asserted that room no.2 is in possession of the plaintiffs and that as she was to carry out repairs of the roof, she had put lock on room no.2. It is further stated that defendants no. 1 to 3 tried to take unlawful possession on 21/05/1994 by breaking open the lock. The said attempt was stoutly opposed by the plaintiffs and therefore, defendants could not take possession of room No.2. In the cross examination, the said witness admitted that application made by the plaintiffs for injunction was rejected and that she did not challenge that order. At the same time, order on the application made by defendants for injunction though was passed, she stated that she is not aware of that order. She also did not understand contents of that order though she was party to the Suit when order was passed. She reiterated that she is in possession of room No.2 and that she did not challenge order below Exhibit 53. She further asserted that even prior to execution of sale deed, room No.2 is in possession of the plaintiffs.

5. Relying on the evidence of this witness, Mr.Pranjape

submitted that it is evident that plaintiffs have committed breach of order dated 03/11/1995. In view thereof, defendants filed application Exh. 237 under Order 39 Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for striking out defence of plaintiffs in view of breach of order below Exhibit 53. By the impugned order, the learned trial Judge rejected that application. He submitted that once the breach of injunction is evident from testimony of Ms.Nina Jayprakash Gantelu, the learned trial Judge ought to have allowed the application and struck out the defence of the plaintiffs.

6. I have considered the submissions made by Mr.Praranjape. I have also perused the material on record. As noted earlier, plaintiffs have instituted Suit for perpetual injunction against defendants No. 1 to 3 from causing any obstruction to their possession of the suit premises. It is not in dispute that suit premises consists of 4 rooms. It appears that defendants have filed written statement in November 1999 and in paragraph 3, it was asserted that pending the Suit on 02/04/1996, plaintiffs demolished part of room No.2 and took unlawful possession. The defendants, therefore, set up counter claim for possession of rooms No. 2 & 3. The defendants thereafter filed affidavit in lieu of examination-in-chief in support of counter claim on 25/01/2008 and prayed for restoration of possession of room no.2 in terms of prayer clause (b). The present

application Exhibit 237 is taken on 09/02/2015 under Order 39 Rule 11 of C.P.C.

7. In the case of *Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi*, (2004) 2 Mh.L.J 1 the Division Bench of this Court has interpreted Order 39 Rule 11 as applicable to State of Maharashtra. After considering various rulings in paragraph 11, it was observed thus :

11. Applying the aforesaid observations and reasoning of the Supreme Court in *Babbar Sewing Machine Co.* with regard to Order 11, Rule 21 of the Code of Civil Procedure and *Bimal Chand Jain* with regard to Order 15, Rule 5 of the Code of Civil Procedure as amended in U.P. in our considered opinion, the provision contained in sub-rule (1) of Rule 11 of Order 39 applicable in Maharashtra is directory and we hold accordingly. The view taken by the two learned Single Judges in *Ratnakar D. Patade* and *Smt. Asha M. Joshi* to the effect that Order 39, Rule 11(1) of Code of Civil Procedure is mandatory cannot be held to be laying down the correct position of law and we overrule the said decisions.

The Division Bench held that provision of Order 39 Rule 11 of C.P.C. applicable in Maharashtra is directory and not mandatory.

8. As noted earlier that in November 1999, defendants filed written statement alleging dispossession of room No. 2 by the plaintiffs. After the evidence of witness- Ms.Nina Jayprakash Gantelu was recorded, the present application is taken out on 09/02/2015. Apart from this delay and laches on the part of the defendants, Suit of plaintiffs is essentially for perpetual injunction. Consistent with this case, if the witness has deposed that she is in possession of room

no.2, it cannot be said that because of this evidence referred hereinabove, case is made out by the defendants for striking out defence. In other words, if plaintiff's witness were to admit that she is not in possession of room no.2, she will fail in the Suit. The learned trial Judge while rejecting the application has observed that it is the case of the plaintiffs that they are in possession and are exclusive owner of the suit premises. The defendants have no right to create any obstruction to the possession of the plaintiffs. It is for the plaintiffs to prove their possession and ownership of the suit premises and to establish their case, the plaintiffs have every right to lead oral as well as documentary evidence. Only because the finding is given on prima facie evidence as regards possession of the suit premises, the plaintiffs cannot be refused to cross examine defendants as they have set up counter claim.

9. I view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petitions fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)