

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

WRIT PETITION NO. 3071 OF 2016

1.Mrs. Nirmala Balasaheb Bhintade
and Ors.

Petitioners

Vs

1. M/s. Aluminum Profiles Ltd and
Ors.

.. Respondents

Mr. Vivek Salunkhe, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.

DATE : 14/03/2016

PC:

1. Heard Mr. Vivek Salunkhe, learned counsel for the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 4.2.2016 passed by the learned Ad-hoc District Judge-2 Baramati in Misc. Civil; Appeal No.78 of 2015. By that order, the learned District Judge allowed Appeal preferred by respondents no.1 and 2, hereinafter referred to as 'defendants', and quashed and set aside the Judgment and order dated 16.10.2015 passed by the learned Civil Judge, Jr. Dn, Daund below Exhibit-5 in Regular Civil Suit No.333 of 2015. The learned District Judge dismissed Application Exhibit-5 preferred by the petitioners, hereinafter referred to as 'plaintiffs'.

3. The plaintiffs have instituted suit for perpetual injunction restraining defendants no.1 and 2 and respondents no.3 to 6,

hereinafter referred to as 'defendants no.3 to 6', from disturbing their peaceful possession and enjoyment of the property bearing Gat no.403/1, admeasuring 3 Hectors, situate at village Bhandgaon, Tq.-Daund, District-Pune (for sort, 'suit property') and from entering into the suit property and causing annoyance, nuisance on the suit property either through themselves, their agents and their power of attorney holders; for perpetual injunction restraining the defendants from constructing and/or developing road which is going from the suit property to Pune-Solapur Highway.

4. During the pendency of the suit, the plaintiffs took out application Exhibit-5 for temporary injunction restraining the defendants from disturbing their possession as also restraining the defendants from constructing and/or developing the road. By ad-interim order dated 19.9.2015, the learned trial Judge issued temporary injunction restraining the defendants from causing obstruction to the plaintiffs possession over the suit property. After hearing both sides, by the Judgment and order dated 16.10.2015, the learned trial Judge allowed the application and restrained the defendants from creating any road through the suit property and causing any kind of disturbance to the plaintiffs' possession over the suit property till decision of the suit.

5. Aggrieved by that decision, defendants no.1 and 2

preferred Misc. Civil Appeal. Learned District Judge allowed the Appeal on 4.2.2016. It is against this decision, the plaintiffs have instituted the present petition.

6. Mr. Salunkhe submitted that in paragraph 3 of the plaint, the plaintiffs specifically asserted that they are absolute owners and occupiers of the suit property. The suit property is in their possessions since last 17 years. The plaintiffs are having rights, title and interest in the suit property. In paragraph 5 of the written statement filed by defendants no. 1 to 6 and say to Exhibit-5, the defendants admitted that the contents of paragraphs 2 and 3 are generally true and correct. In other words, Mr. Salunkhe submitted that defendants no.1 to 6 admitted the contents of paragraph 3 of the plaint.

7. Mr. Salunkhe further submitted that in fact defendant no.1 and others instituted proceedings under section 5 of the Mamlatdar's Courts Act, 1906 before Tahasildar, Daund for removal of obstruction. That proceeding was dismissed for non-prosecution. He further submitted that the learned trial Judge issued injunction. That injunction was not stayed during the pendency of the appeal and, for the first time, the learned District Judge dismissed the application by the impugned order. In other words, injunction was all along in force from 19.9.2015.

8. Mr Salunkhe further submitted that in paragraph 16, the learned District Judge further observed that "plaintiffs counsel

failed to show an alternative road available for the defendants to approach Pune-Solapur Highway Road". He submitted that defendants no. 1 and 2 did not raise the contention that the road passing through the suit premises is the only road available and they have no other alternative road for approaching Pune Solapur Highway Road. He submitted that in paragraph 17 of the impugned order, the learned District Judge referred to the sale deed executed by S/S Mohanlal Ratanchand Meher, Narayan Ratanchand Meher, Shesmal Ratanchand Meher in favour of Pramod Nivrutti Kolate and Ms Manda Pramod Kolate on 18.2.1997. Mr. Kolate and Ms Kolate subsequently executed sale deed in favour of the plaintiffs on 30.6.1998. In paragraph 17, the learned District Judge observed that "plaintiffs' vendor Mr and Ms Kolate had knowledge about this road. So the sale deed of the plaintiffs as well as their vendor speak about this road in the sale deed." He submitted that perusal of the sale deeds dated 18.2.1997 and 30.6.1998 shows that there is no recital to that effect. In short, he submitted that the observations in paragraph 17 are contrary to recitals in the sale deed.

9. Lastly, he submitted that the plaintiffs are in settled possession of the suit property for more than 17 years and the said fact is admitted by defendants no.1 to 6 in their written statement. In other words, the plaintiffs are in settled possession of the suit property and their possession cannot be disturbed

without following due process of law. In support of this proposition, he relied upon the following decisions;

- (i) Girnar Residency Co-operative Housing Society Ltd Vs. Shradha Cooperative Housing Society Ltd, 2014 (4) Bom C.R.345;
- (ii) Maroti Jairam Kadam Vs Mahadu Govind Kadam, 2010 (4) Mh L.J. 990.

He, therefore submitted that petition requires consideration.

10. I have considered the submissions advanced by Mr. Salunkhe. I have also perused the material on record. It is not in dispute that Multanchand Meher had instituted Regular Civil Suit No. 327 of 1996 against defendant no.1 herein. That suit was instituted on his behalf as also in his capacity as General Power of Attorney of the joint family. That suit was comprised on 8.1.1997 and the compromise decree was passed in terms of compromise terms. Clause (1) of the compromise purshis recorded that suit property (Gat No.403/1) among others are owned by plaintiff Multanchand Meher and his brothers (1) Chandamal, (2) Mohanlal, (3) Narayan (4) Sheshpal. Clause 2 thereof recorded that North-south road admeasuring 175 feet in length and East-West 15 feet width passing through Gat no.403/1 (for short, 'suit road') was given on ownership basis to defendant no.1 for approaching their property in Gat no. 407 and 408 and accordingly actual possession was handed over to defendant no.1. The dispute pertains to the suit road passing through the

suit property.

11. As noted earlier, the plaintiffs have instituted suit for perpetual injunction and during pendency of that suit, he took out application Exhibit-5. The learned trial Judge allowed the application. In Paragraph 14, the learned trial Judge observed thus:

“14. According to defendant the road through the gat no.403/1 came into existence in terms of compromise memo / decree in RCS No.327/1996. I have minutely gone through the certified copy of compromise memo which was exhibited as 17 in RCS No.327/1996. One Multanchand Ratanchand Mehar being the plaintiff had executed the said compromise for himself and for the benefit of his joint family. According to the Ld. Counsel for the defendant the original owner Mohanlal, Narayan and Shesmal who executed the sale deed in favour of Manda and Pramod Kolte i.e. the vendor of plaintiffs are the real brothers of Multanchand . However, Despite the said fact, Multanchand was not executant of the sale deed in favour of vendor of plaintiff. The title of compromise memo shows that, he had filed the suit on the basis of power of attorney. No doubt that Principal of law says that, when property is in danger any member of joint family without having authority of others can file the suit for its protection. But when such member want or intends to create or confer any right, title and interest in favour of third party with respect to joint family property, then he must show his specific authority. In the absence of that authority any transaction done by the member of joint family is not binding upon others. The defendant has not filed on record any such authority which the said Multanchand was having to execute the compromise memo. The power of attorney which was executed in favour of Multanchand is necessary in the light of above settled Principal of Law. Because the sale deed is not executed by the Multanchand but by his three brothers Mohanlal, Narayan and Sheshmal in their personal and independency capacity. The another question arises that, whether the mere existence of compromise memo can confer any right, title in favour of third party. When the right, interest is created by the way of compromise decree or otherwise it must be registered on

the basis of required court fee. In this case, that was not done later on and the compromise memo remains to the paper effect only. The compromise memo prima facie appears to have hit by the provisions of S.17 of the Registration Act. Therefore, I am of considered view that compromise memo cannot be taken into account even for the prima facie purpose."

Aggrieved by that decision, defendants no.1 and 2 preferred appeal. In paragraph 13, the learned District Judge observe thus:-

"13. The learned trial Court has not considered the compromise pursis and consent decree to ascertain prima facie case of the plaintiffs. According to me the learned trial Court has committed a mistake of law by ignoring the compromise pursis and consent decree while deciding the temporary injunction application. According to learned trial Court the compromise pursis and consent decree is hit by section 17 of Registration Act. So the learned trial Court has not considered these two documents. It is settled proposition of law that application filed under R.1 of O.39 of CPC is required to be considered on the basis of affidavits and other documents produced by the parties. The court is not required to hold a detailed inquiry like a suit while deciding this application. The court only requires to ascertain prima facie case of the plaintiff and the balance of convenience on the basis of material placed before him by both the sides. In this case according to me the learned trial Court has committed a mistake of law by ignoring compromise pursis and consent decree while deciding the application. The reason assigned by the learned trial Court for ignoring these two documents is not acceptable. According to me section 17 of the Registration Act is not applicable to a compromise pursis. The consent decree can be read in evidence for collateral purpose."

12. Perusal of paragraph 14 of the trial Court's Judgment, extracted herein above, shows that the learned trial Judge observed that when Multanchand Meher wanted or intended to create or confer any right, title and interest in favour of third party with respect to joint family property, then he must show his

specific authority. In the absence of that authority, any transaction done by the member of joint family is not binding on others. The defendant has not filed on record any such authority which Multanchand was having to execute compromise memo. The Power of Attorney which was executed in favour of Multanchand is necessary in the light of the above settled principles of law. The other question arises as to whether mere existence of compromise memo can confer any right, title or interest in favour of third party. When the right, interest is created by way of compromise decree or otherwise, it must be registered on the basis of required court fee. In this case, that was not done later-on and the compromise memo remains to the paper effect only. The compromise memo prima facie appears to have hit by the provision of Section 17 of Registration Act. The learned trial Judge therefore discarded compromise memo even for prima facie purpose.

13. In my opinion, the learned trial Judge failed to appreciate that the plaintiffs herein did not challenge the compromise decree at all. The validity or otherwise of the compromise decree was not put in issue. If that be so, the learned trial Judge could not have made observations quoted in paragraph 14 above. In my opinion, the learned trial Judge totally misdirected himself while considering the prima facie case while deciding the application Exhibit-5. The learned trial Judge should have

considered whether in the light of the compromise decree, the plaintiffs have made out a prima face case, whether balance of convenience lies in favour of the plaintiffs and whether irreparable injury would be caused to the plaintiffs if injunction is refused. As noted earlier, the compromise decree was passed in the year 1997. Present suit is instituted in the year 2015.

14. As against this, the learned District Judge has considered the compromise decree in paragraph 13 of the impugned order and observed that the learned trial Judge committed a mistake of law by ignoring compromise purshis and consent decree while deciding the injunction application. The learned District judge observed that while decision the application under Order 39 Rule 1, the Court is required to consider that application on the basis of affidavits and other documents produced by the parties. I do not find that the learned District Judge has committed any error while taking into account the compromise decree. Merely because the compromise decree is not referred in the sale deeds dated 18.2.1997 and 30.6.1998, that will not amount to wiping out the compromise decree passed in the year 1997.

15. Mr Salunkhe relied upon the decision of Girnar Residency Co-operative Hsg. Society Ltd (supra). In that case the decision of Apex Court in Rame Gowda Vs. M.Varadappa Naidu, (2004) 1 SCC 769 and in particular paragraph 9 was referred. The question is whether in the facts and circumstances of the present case,

the plaintiffs can claim to be in settled possession of the suit road passing through the suit property. In my opinion, perusal of clause 2 of the compromise purshis and the consent decree passed in terms thereof shows that possession of the suit road was actually handed over to defendant no.1. In view thereof, prima facie at this stage it cannot be accepted that the plaintiffs are in settled possession of the suit property. In the case of Maroti Jairam Kadam (supra), this Court also referred to the decision of Rame Gowda. As I have prima facie held that in view of the consent decree, the plaintiffs cannot claim to be in settled possession, these decisions do not advance the case of the plaintiffs.

16. Mr Salunkhe relied upon paragraph 3 of the plaint and paragraph 5 of the written statement. In paragraph 3 of the plaint, the plaintiffs asserted that they are absolute owners and occupiers of the suit property meaning thereby they are in possession of even the suit road and that they are in possession since last 17 years. In paragraph 5 of the written statement defendants no.1 to 6 contended that contents of paragraphs 2 and 3 are substantially correct. In my opinion, the contention of Mr Salunkhe that as defendants no. 1 to 6 admitted the contents of paragraphs 2 and 3 are substantially correct, they also admit that the plaintiffs are in possession of the suit road is misconceived. It is absolutely clear from clause (2) of the

consent terms that the suit road was transferred on ownership basis in favour of defendant no.1 herein and actual possession was also handed over to defendant no.1. Save and except that, the plaintiffs are undoubtedly owner of Gat no.403/1. Understood thus, I do not find any merit in the submission of Mr Salunkhe that as defendants no.1 to 6 admitted ownership of the plaintiffs as also their possession, the learned District Judge was not justified in allowing the appeal.

17. Mr. Salunkhe relied upon map at page 27 of additional compilation drawn by Taluka Inspector of Land Records on the application made by the plaintiffs. Section 83 of the Indian Evidence Act, 1872 (for short, 'Act') lays down that Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government, were so made, and are accurate; **but maps or plans made for the purpose of any cause must be proved to be accurate.**

In view of Section 83 of the Act, at this stage, unless the plaintiffs prove the accuracy of the map drawn by T.I.LR. on his application, the same cannot be relied as on their application, map was drawn. As far as Gat map at page 26 of the additional compilation is concerned, upon taking instructions from power of attorney holder of the petitioner who is present in the court, Mr Salunkhe, states that the Gat map at page 26 of the additional compilation is old map. In other words, it is prior to compromise

decree passed in 1997. In view thereof, reliance placed by Mr Salunkhe on pages 26 and 27 of the additional compilation does not advance the case of the plaintiffs. Lastly, Mr Salunkhe relies on photographs which show fencing put up by the plaintiffs. In my opinion, in view of the consent decree, the plaintiffs prima facie are not justified in fencing the property which has in effect closing the suit road given to defendant no.1 as per compromise decree.

18. As far as initiation of proceedings under section 5 of the Mamlatdar Courts Act, 1906 is concerned, it is not in dispute that said proceedings are dismissed for non prosecution. In other words, these proceedings are not decided on merits.

19. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has laid down the following principles:

“....., 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.

20. After considering the order passed by the learned trial Judge, I am satisfied that the learned trial Judge has exercised the discretion arbitrarily, capriciously or perversely. The learned trial Judge has failed to apply the principles regulating grant or refusal of injunction. The learned trial Judge has not exercised the discretion reasonably and in a judicial manner. It is in this view of the matter, the learned District Judge was fully justified in interfering with the discretionary order. 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.

21. It is expressly made clear that the observations made herein are tentative and prima facie and are made only for the purpose of considering the correctness of the impugned order. The learned trial Judge will decide the suit on the basis of evidence on record and on its own merits and in accordance with law uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

(R.G.KETKAR, J.)