

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER (ST.) NO. 35068 OF 2015
WITH
CIVIL APPLICATION(ST.) No. 35070 OF 2015 IN A.O.(ST.) NO. 35068 OF 2015**

Goverdhan Baburao Pawar (Decd.)
through LRs Smt. Muktabai Goverdhan
Pawar & Ors.

... Appellants/Applicants

Vs.

Smt. Saraswati Dnyaneshwar Pawar & Ors. ... Respondents

Mr. S.S. Kulkarni, Advocate for the appellants/applicants.

Mr. Girish R. Agarwal, Advocate for respondent nos. 1 to 6.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 1st March, 2016.

P.C.:

Admit. The learned counsel for respondent nos. 1 to 6 waives service. By consent, the Appeal is heard finally and decided at the stage of admission.

2. This Appeal from Order is directed against the order dated 16th December, 2015 passed by the learned 6th Additional Judge, Small Causes Court, Pune below Exhibit 518 in Special Civil Suit No. 674 of 1993. By the said order, the trial Court has allowed the application filed by the original plaintiffs for injunction. The plaintiffs/respondent nos. 1 to 6 have filed Special Civil Suit No. 674 of 1993 for partition, declaration, injunction and also for accounts. Defendant no.2, who is a legal heir of defendant no.

1, during the pendency of the suit, has demolished a bungalow where he was residing bearing Survey no. 1114/21 situated at Gajanan Housing Society, Shivaji Nagar, Pune. He has obtained permission of the Corporation to construct another residential plot on the said land and as he is going to change the nature of the suit property, the application is moved by the plaintiffs. In the said suit, earlier the trial Court, in Application for interim injunction below Exhibit 8, by an order dated 3rd May, 1997 has restrained the defendants from creating third party interest from selling the immovable suit property till the disposal of the suit. The trial Court has taken a view that when the suit for partition is pending before the trial Court, the defendants should not have demolished the suit property. It held that whether the property is self-acquired by defendant no. 1/ father of defendant no. 2 or it has been purchased out of hotchpotch of HUF is yet to be proved before the Court and therefore, the learned Judge directed that defendant nos. 2a to 2d shall not proceed with the construction of land bearing City Survey No. 1114/21, Gajanan Housing Society, Shivaji Nagar, Pune.

3. The learned counsel Mr. Kulkarni for the appellants has submitted that the suit property is one of the suit properties which are described in the plaint. He submitted that there was no injunction on the demolition of

the suit property and the said bungalow constructed in the year 1963 was in dilapidated condition. Therefore, it was necessary to reconstruct the same. He submitted that the appellants have been residing in the said bungalow since 1963 till 2015 and their bungalow is demolished and hence they have become roofless. It is necessary for them to construct the house, as it is their permanent residence. The learned counsel further submitted that the appellants are carrying out the construction with all necessary legal permissions from the Corporation. He submitted that the plot of land is hardly 3000 sq. ft. on which the bungalow was standing on the plinth of 800 sq.ft. The learned counsel produced photocopies of the application which was filled in and furnished to the Corporation by the appellants while seeking permission for reconstruction of the bungalow. He further pointed out a status certificate issued by Anirudh Dandekar, Architect engaged by the appellants for the construction of the bungalow. He submitted that the architect has certified that the plans are approved by the Municipal Corporation and the owners are constructing the said residential bungalow for their own personal use. The learned counsel submitted that considering these circumstances, the injunction is to be vacated.

4. Per contra, the learned counsel for the respondents/original plaintiffs opposed this Appeal vehemently. The learned counsel submitted that the

appellants have changed the nature of the suit property, which is not permissible when the suit is pending and it will be decided finally within a short period. He further argued that the appellants be directed to keep the demolished bungalow as it is and shall not construct further, pending suit. He further submitted that if the appellants are going to construct a multi-storied building and likely to dispose of the property and also going to change the nature of the suit property during the pendency of the suit which is not legally permissible. He challenged the right of the appellants to demolish the building. The learned counsel relied on following decisions:

- (i) Maharwal Khewaji Trust (Regd.) Faridkot vs. Baldev Dass, reported in 2004 AIR SCW 6333.
- (ii) Gangubai Babiya Chaudhary & Ors. vs. Sitaram Bhalchandra Sukhtankar & Ors., reported in AIR 1983 SC 742.
- (iii) Syed Mubasheruddin Ahmed & Ors., vs. Syeda Nushat Murtuza, reported in AIR 2006 Andhra Pradesh 45.
- (iv) Smt. Parboti Adhikary & Anr. vs. Pradip Adhikary & Ors., reported in AIR 2004 Gauhati 49.

5. A suit for partition and other reliefs is pending since 1993. The trial Court has allowed Exhibit 8 filed by the plaintiffs/respondents for interim

injunction and thereby directed the defendants/present appellants not to create third party interest from selling the immovable suit property till disposal of the suit. Thus, the trial Court intended to stop the multiplicity of the proceedings and transfer of interest to third party so that if the suit is decided in favour of the plaintiffs/respondents then they should not be deprived of the fruits of decree. Therefore, it is necessary to keep the property intact.

6. Perused the plaint, so also perused Exhibit 8 Application for interim injunction which was filed on 15th July, 1993. It shows that the plaintiffs/respondents have taken care of moving such application in order to save the property and to avoid the multiple proceedings. However, there was no prayer to injunct the appellants from changing the nature of the property. The submissions of learned counsel that in the year 1993, the plaintiffs/respondents did not think of moving such application and praying that the appellants should be restrained from changing the nature of the suit property are correct. However, the fact cannot be ignored that in the year 2015, when defendant no. 2 applied to the Corporation for reconstruction of the residential plot, no order of injunction against the appellants that they shall not change the nature of the property was in force. It is true that when the suit for partition is pending, the suit

properties which are the subject matter of partition are to be kept intact and the nature of such properties should not be changed.

7. In **Maharwal Khewaji Trust** (*supra*) a suit for possession was filed and the interim injunction restraining the respondent from alienating the suit property and putting up any construction thereon was granted by the trial Court. The respondent filed the appeal before the District Court, which was allowed with order that alienation made, if any, will be subject to the law of lis pendens and constructions, if any, put by the respondent will have to be removed at his own risk and cost. The revision filed against the order to the High Court was dismissed but had obtained an undertaking from the respondent. Thereafter, Civil Appeal was filed before the Supreme Court and the Supreme Court held that “unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings.” This was a suit for possession and the present case is for partition, hence it is distinguishable from the case of **Maharwal Khewaji Trust**.

8. In the case of **Gangubai Babiya Chaudhary** (*supra*), the judgment and order of the High Court of Bombay was challenged before the Supreme Court in Civil Appeal. The appellants had filed a suit for injunction restraining defendant nos. 1 and 2 from interfering in any manner with the possession of the plaintiffs during the pendency of the suit. Interim injunction was granted. In the said case, the respondents wanted to construct , however, the Supreme Court took a view that if the construction is allowed by the use of F.S.I., then the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. This is not a suit on the partnership.

9. In the case of **Syed Mubasheruddin Ahmed** (*supra*), the Division Bench of the Andhra Pradesh High Court held that temporary injunction restraining the appellants from making further demolition of the part of the suit property and also from taking up any construction thereon pending disposal of the suit is to be granted.

10. In the case of **Parboti Adhikary** (*supra*), a suit was filed for declaration and permanent injunction restraining the defendants from raising any construction on the suit land. The learned Single Judge of Gauhati High Court held that vacation of order of status quo by the

Appellate Court was not proper but the order of trial Court granting status quo was correct as there was possibility of defendant altering the nature of suit property during pendency.

11. The case laws discussed above are not applicable to the set of present facts mainly on the ground that present suit is for partition wherein the plaintiffs claims 1/7 share in the properties which is not reduced due to reconstruction. The appellants have been residing in the said bungalow since 1963. New bungalow was constructed. At this stage, this Court does not want to disclose the right of the parties in the suit property, i.e., whether the property is ancestral or self-acquired and is not at all determining the rights of the parties and that will be decided by the trial Court, as the major portion of the evidence is recorded till today. Though there was no order of injunction, it was expected from the appellants to approach the Court and inform that they want to demolish the suit property and to reconstruct it, as the house is in dilapidated condition. However, they did not intimate the plan to demolish the bungalow and to reconstruct the building on the suit plot. The legality of demolition and construction on the suit plot and suit bungalow cannot be questioned and decided at this stage, as the plans were submitted to the Corporation through architect and the Corporation has given permission to construct

ground plus two storied building on the suit plot. When the suit bungalow is demolished by the appellants/defendants and the demolition cannot be said illegal, it would have been proper if the permission of the Court would have been taken to demolish the said house. It is also to be taken into account that house was constructed in the year 1963 and the appellants along with their 10 family members are residing in the said house. As on today, the bungalow is demolished. They are homeless. The plans are approved by the Corporation and permission to reconstruct ground plus 2 storied building is given. Under such circumstances, the appellants have made out a case of balance of convenience and so also comparable hardship. As submitted by the learned counsel for the appellants that the family of the appellants are large consisting of 10 members and earlier bungalow was ground plus one storied consisting of 8 rooms. However, new building is going to be residential house consisting of ground plus two storied with 15 rooms. As claimed by the respondents/plaintiffs, they are having $1/7^{\text{th}}$ share in the suit property which can be accepted at this interim stage. If the suit plot remained to be kept vacant without any structure when the appellants are having permission of the Corporation in the hand to construct ground plus two storied building in place of ground plus one storied consisting of 8 rooms, then though the property has changed its nature, it will lead more waste of the property. If a building is

constructed, then the value of the property will be added and therefore, it cannot be said that it is a deterioration or waste of the said property.

12. It is made clear that the appellants though are allowed to construct the building, they are necessarily put in terms and shall obey the said terms and conditions without any excuse:

- (i) The order of the trial Court injuncting the appellants/defendants to construct a building in City Survey No. 1114/21 at Gajanan Housing Society is hereby vacated.
- (ii) The appellants shall not create any third party interest in the building which is going to be constructed and it will be constructed as per the approved plan of the Corporation.
- (iii) The appellants shall not part with the possession and create any encumbrance on it.
- (iv) The appellants shall not change the user of the building and shall stick to the residential purpose of the building.
- (v) The appellants shall not claim any expenses or demand any share in the expenses in the cost of construction of the building from the plaintiffs or any other defendants, in the event if plaintiffs succeed.
- (vi) The appellants may construct the building completely at their

costs and it will be a subject to the final outcome of the suit.

- (vii) The appellants are directed to submit the plan sanctioned by the Corporation before the trial Court and copy of the same is to be supplied to the plaintiffs.

13. At this stage, the learned counsel for the respondent nos. 1 to 6 prays to stay the operation of this order as he wants to challenge this order before the Supreme Court. The learned counsel for the appellants opposes this prayer. However, the operation of the order is stayed for a period of four weeks from today.

14. Appeal from Order is allowed. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)