

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.582 OF 2016
IN
NOTICE OF MOTION NO.130 OF 2013
IN
SUIT NO.49 OF 2013
WITH
NOTICE OF MOTION (L) NO.835 OF 2014
IN
APPEAL NO.582 OF 2016**

Rabindra Nigam and anr. ... Appellants

Versus

Banoo Nusserwanji Cama and 7 Ors. ... Respondents

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Mr. P. K. Dhakephalkar, Sr. Advocate with Mr.Chirag Modi,
Mr. Nilesh Tated, Mr. Rupesh Parekh i/b. DSK Legal for appellants.
Mr. Chaitanya Chavan a/w Mr. Yohaana Rubens i/b. M/s Vigil Juris
for respondents.

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**CORAM: DR. MANJULA CHELLUR, C.J.
AND M.S.SONAK, J.**

DATE : 13th OCTOBER 2016

P.C.:

1. Heard learned counsel for the parties.
2. Reply to the additional affidavit is taken on record.
Draft amendment of the Appeal Memo is placed on record by the
appellants.

3. The appellants challenge the order dated 10th March 2014 by which the learned Single Judge has dismissed Notice of Motion No.130 of 2013 in Suit No.49 of 2013 declining relief of temporary injunction to the appellants-plaintiffs.

4. Mr. Dhakephalkar, learned senior advocate for the appellants submitted that the appellants have become owners of the suit property by way of adverse possession. He submitted that, access to the suit plot is only through the property of the appellants and on this basis, the appellants have acquired and held on possession of the suit property since the year 1961. He submitted that appellants have also constructed the compound wall to protect their possession. In these circumstances Mr. Dhakephalkar submitted that the impugned order, which denies relief of temporary injunction to the appellants warrants interference.

5. Mr. Dhakephalkar, learned senior advocate submitted that there are certain subsequent developments, which have been set out in the affidavit in rejoinder, which makes it quite clear that it is the appellants who are in possession of the suit property. He further submitted that, the appellants may be permitted to amend

the Memo of Appeal so as to incorporate such subsequent developments in the Memo of Appeal. He also submitted that the subsequent developments and the documents in support thereof are required to be taken into consideration in these proceedings and on the basis of the same, the impugned order is liable to be interfered.

6. On the other hand, Mr. Chavan, learned counsel for the respondents submitted that there is no dispute that the respondents are owners of the suit property. He submitted that not a shred of evidence was produced by the appellants in support of their alleged possession since 1961. The compound wall which is referred to by the appellants may have been constructed around their own property but not on the suit property. The learned Single Judge, upon taking into consideration the entire material on record, has rightly held that, the appellants have failed to even establish that they are in possession of the suit property. In such circumstances, application for interim relief was rightly rejected.

7. We have considered the rival submissions and perused the material on record. In our opinion, there is no case made to

interfere with the impugned order.

8. The learned Single Judge upon due consideration of the material on record has recorded *prima facie* finding that the appellants cannot be said to be in possession of the suit property. The appellants contention with regard to compound wall has been considered and found not to be acceptable. The photographs submitted by the appellants have also been considered and rightly rejected. The learned Single Judge has drawn appropriate inferences from the circumstances that the names of the appellants found no place in the revenue record, despite their claim of possession since last over six decades. The learned Single Judge has rightly held that possession over the open plot of land cannot be established on the basis of photographs showing one container and a board painted on the container. There is no perversity in recording the *prima facie* findings.

9. There is no dispute that the respondents are the owners of the suit property. The appellants, at least, *prima facie*, have failed to establish their possession and therefore, there arises no question of granting them any interim relief, on the basis of their

plea of adverse possession. The learned Single Judge has not erred on principle and there is neither any arbitrariness nor any unreasonableness involved.

10. Admittedly, the so called developments referred to in the affidavit in rejoinder were not existing at the stage when the impugned order came to be made. The memo of appeal, cannot be amended to bring on record subsequent developments and documents in support thereof. On the basis of such alleged subsequent developments, there is no question of interfering with the impugned order. If, the appellants, have any other remedy available to them under the law, dismissal of this appeal will not come in their way to seek the same. Accordingly, we leave all contentions of all parties open on this aspect. Suffice however to note that there is no case made out to interfere with the impugned order.

11. This appeal is against the interlocutory order. The scope of such appeal is discussed by the Supreme Court in the case of *Wander Ltd. & Anr. vs. Antox India P Ltd.*¹ In paragraphs 9 and 14, the Supreme Court has observed thus :

¹ 1990 (Supp) SCC 727

“9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

“...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience lies".

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, 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. 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 the 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 Ltd. V. Potha Joseph: (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseinton & Co. v. Jhanaton (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’.

The appellate judgment does not seem to defer to this principle.”

12. The aforesaid position has been reiterated by the Supreme Court in the case of **Mohd. Mehtab Khan & Ors. vs.**

Khushnuma Ibrahim Khan & Ors.² (paragraphs 20 to 22).

13. Applying the aforesaid principles to the present case, we see no reason to entertain the present appeal. The appeal is therefore dismissed. We further clarify that the dismissal of this appeal, will not come in the way of the appellants-plaintiffs to seek any other remedy available to them in accordance with law.

14. In view of dismissal of appeal, Notice of Motion does not survive and is disposed of accordingly.

CHIEF JUSTICE

(M.S.SONAK, J.)

² (2013) 9 SCC 221