

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 16 OF 2017
WITH
CIVIL APPLICATION NO. 2033 OF 2017

Bapurao Laxman Gawali

...Appellant

versus

Janardhan Bhujangrao Garje

...Respondent

.....
Mr. V.V. Bhavthankar, advocate for the appellant

Mr. S.S. Thombre h/f Mr. B.S. Kudale, advocate for respondent

.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 22.03.2017**

**Date of pronouncing
the Order: 04.04.2017**

PER COURT :-

1. By consent of learned counsel for the parties, heard finally at admission stage.
2. Being aggrieved by the judgment and order dated 05.01.2017 passed by the Adhoc District Judge-1, Majalgaon, in Misc. Civil Appeal No. 18 of 2015, original respondent before the lower appellate court/original defendant in the suit has preferred this appeal.

3. Brief facts giving rise to the present appeal are as follows:-

a) The present respondent/plaintiff has instituted Regular Civil Suit No. 305 of 2014 for decree of perpetual injunction against the appellant/defendant herein. According to the respondent/plaintiff, the land survey No. 9/Gat No.11 admeasuring 7 H 26 R was originally owned and possessed by one Ganpatrao. The said Ganpatrao was issue-less and he had adopted one Shri Eknath, as his son. Thus, after death of original owner Ganpatrao, said Eknath became the owner in possession of aforesaid land Gat No.11. The said Eknath since addicted to liquor, started selling out the land without any legal necessity. Consequently, his two sons viz. Arun and Subhash, wife Yamunabai had instituted R.C.S. No. 18 of 1991 for partition and separate possession in respect of the aforesaid land.

b) The R.C.S. 18 of 1991 came to be decreed in terms of the compromise arrived at between the parties by judgment and decree dated 1.7.1999. In terms of compromise decree, said two sons viz. Arun and Subhash and wife Yamunabai in the suit land Gat No.11, got share of 3 H 80 R of land. As per the terms of compromise arrived at in R.C.S. No. 18 of 1991, each of them got 1 H 27 R land from the aforesaid total land of 3 H 80 R. Subhash got land 1 H 27 R

from southern side and son Arun got 1 H 27 R land from northern side, whereas Yamunabai got the land admeasuring 1 H 27 R of the middle portion. Thereafter, said Yamunabai has sold land 1 H 27 R of her share under registered sale deed dated 24.2.2000 for valuable consideration in favour of the respondent/plaintiff and possession of the said land admeasuring 1 H 27 R also handed over to the respondent/plaintiff on the date of execution of sale deed. The respondent/plaintiff further contends that at the time of execution of sale deed, land of one Parmeshwar Ugale was shown towards western side, however, the respondent/plaintiff and vendor Yamunabai were not knowing at the time of said execution of the sale deed that Parmeshwar Ugale sold his land to one Choudhari. Thus, inadvertently, in the four boundaries of the land as shown in the sale deed, the land of Parmeshwar Ugale was shown towards western side. Thus, the vendor Yamunabai had executed correction deed bearing No. 631 of 2014 dated 11.2.2014. It is further case of the respondent/plaintiff that after execution of sale deed, he had applied the Tahsildar and T.I.L.R. office, Majalgaon and got measured the land fixed the boundaries and also prepared *Najari* map. None has objected for the said measurement map and *Najari* map.

c) Meanwhile, the said two sons viz. Subhash and Arun and their

mother Yamunabai had instituted R.C.S. No. 234 of 2000 against Eknath, three sisters of Subhash and Arun and one purchaser Moinoddin for cancellation of compromise decree in R.C.S. No. 18 of 1991, as aforesaid and other consequential reliefs. The said R.C.S. No. 234 of 2000 came to be decreed in terms of the compromise arrived at between the parties and in terms of the said compromise, the compromise decree passed in R.C.S. No. 18 of 1991 was cancelled.

d) In the year 2001, one Dhondabai, who happened to be the wife of original owner Ganpatrao Raut and the mother of adopted son Eknath, had instituted R.C.S. No. 403 of 2001 for declaration of ownership and decree of perpetual injunction in respect of land Gat No.11 admeasuring 3 H 80 R, which was the subject matter of R.C.S. No. 18 of 1991 and R.C.S. No. 234 of 2000, against Eknath, his two sons Subhash and Arun and Yamunabai (vendor of the present respondent/plaintiff). The said suit came to be decreed in terms of compromise arrived at between the parties on 6.12.2001 and in terms of the said compromise, the land admeasuring 3 H 80 R was given to Dhondabai. On the basis of compromise decree passed in R.C.S. No. 403 of 2001, mutation entry No. 133 was also sanctioned in the name of Dhondabai. Said Dhondabai had executed registered sale deed on 20.11.2002 of the land admeasuring 2 H 83 R to the

present appellant/defendant.

e) The present respondent/plaintiff had thus, instituted R.C.S. No. 289 of 2003 (old) and 63 of 2006 (new) against Eknath, his two sons, said Yamunabai, Dhondabai, present appellant/defendant and others for declaration that the compromise decree passed in R.C.S. No. 234 of 2000 and 403 of 2001 and the mutation entry sanctioned on its basis are not binding on him and for declaration of ownership in respect of the land purchased by him from vendor Yamunabai and decree of perpetual injunction in respect of the said land. The said suit bearing R.C.S. No. 63 of 2006 (new) came to be decreed by judgment and decree passed by the Civil Court on 28.7.2011.

f) Being aggrieved by the judgment and decree passed in said R.C.S. No. 63 of 2006 (new), the present appellant/defendant has preferred R.C.A. No. 48 of 2011. The learned District Judge, Majalgaon by its judgment and order dated 21.5.2012, allowed the said appeal and set aside the judgment and decree passed in R.C.S. No. 63 of 2006 (new) to the extent of present appellant/defendant by modifying the said judgment and decree. The present respondent/plaintiff has not preferred any proceeding against the judgment and order passed in said Regular Civil Appeal No. 48 of 2011.

g) Meanwhile, the present appellant/defendant Bapurao had instituted R.C.S. No. 32 of 2004 against Eknath, his two sons, his wife Yamunabai, Dhondabai, daughters of Eknath and Yamunabai and also against present respondent/plaintiff and two purchasers for decree of perpetual injunction in respect of the said land. The learned 2nd Joint C.J.J.D. Majalgaon, by its judgment and decree dated 27.8.2014, decreed the said suit with costs and restrained the appellant/defendant in the said suit by decree of perpetual injunction from interfering into the possession of present appellant/defendant Bapurao over the suit land block No. 11 admeasuring 2 H 83 R. Being aggrieved by the same, one Vasant and present respondent/plaintiff Janardhan filed Regular Civil Appeal No. 59 of 2014 challenging the decree passed in aforesaid R.C.S. No. 32 of 2004, which is still pending, however, their application for staying the effect of the said decree came to be rejected by the lower appellate court and also confirmed by this Court in writ petition.

h) The respondent/plaintiff Janardhan has therefore instituted the suit which is subject matter of the present appeal, bearing R.C.S. No. 305 of 2014 for decree of permanent injunction and as aforesaid also had filed an application Exh.5 seeking order of temporary injunction to protect his possession in respect of suit land Gat No.11

admeasuring 1 H 27 R. The learned 3rd Joint C.J.J.D. Majalgaon, by order dated 29.4.2015 below Exh.5, rejected the said application. Being aggrieved by the same, the respondent/plaintiff Janardhan had preferred Misc. Civil Appeal No. 18 of 2015 and the learned Ad-hoc District Judge-1, Majalgaon by its impugned order dated 5.1.2017 allowed the said Misc. Civil Appeal No. 18 of 2015 and set aside the order passed by 3rd Joint C.J.J.D. Majalgaon in R.C.S. No. 305 of 2014 below Exh.5 and allowed the said application Exh.5 and restrained the appellant/defendant Bapurao from causing any obstruction into peaceful possession of the respondent/plaintiff over the suit land till disposal of R.C.S. No. 305 of 2014. Hence, this appeal.

4. Learned counsel for the appellant/defendant submits that in terms of compromise decree passed between parties in R.C.S. No. 403 of 2001, the land admeasuring 3 H 80 R came to be allotted to Dhondabai and mutation entry No. 133 came to be sanctioned in her name. On 20.11.2002, out of the said land, said Dhondabai had executed registered sale deed in respect of land admeasuring 2 H 83 R in favour of the appellant/defendant and accordingly mutation entry No. 1340 came to be sanctioned in his favour. The respondent/plaintiff had instituted R.C.S. No. 63 of 2006 (new) seeking declaration that the compromise decree passed in R.C.S.

Nos. 234 of 2000 and 403 of 2001 are not binding on him and even though the said suit was decreed in terms of reliefs claimed, in appeal bearing R.C.A. No. 48 of 2011 preferred by the appellant/defendant, the appellate court has set aside the said decree to the extent of present appellant/defendant. The present respondent/ plaintiff has not preferred any proceeding against the judgment and order passed in aforesaid Regular Civil Appeal No. 48 of 2011.

5. Learned counsel for the appellant/defendant submits that the appellate court while disposing of said R.C.A. No. 48 of 2011, has specifically observed that the lands of the appellant/defendant and respondent/plaintiff in the said appeal appear to be different. The respondent/plaintiff has instituted R.C.S. No. 305 of 2014 with some ulterior motive and he has failed to approach the Court with clean hands. The respondent/plaintiff after lapse of 14 years, from the date of execution of sale deed dated 24.2.2000, got executed new correction deed dated 11.2.2014 in collusion with his vendor Yamunabai and he has instituted present R.C.S. No. 305 of 2014.

6. Learned counsel for the appellant/defendant submits that the respondent/plaintiff is not sure about location of his land allegedly owned by him. Learned counsel submits that the lower appellate

court has not even considered that the suit instituted by the appellant/defendant bearing R.C.S. No. 32 of 2004, which came to be decreed in terms of its prayer clause. Though the respondent/plaintiff has preferred appeal against the same, no interim relief was granted in his favour staying the effect of decree passed in R.C.S. No. 32 of 2004. Thus, the decree of permanent injunction is operating against the respondent/plaintiff. In view of the same, the impugned judgment and order passed by the lower appellate court granting injunction in favour of respondent/plaintiff is liable to be quashed and set aside.

7. The learned counsel for the appellant/defendant submits that in R.C.S. No. 63 of 2006 (new), instituted by the present respondent/plaintiff, he has admitted in his cross examination that he has no concern with the land admeasuring 2 H 83 R, which is adjacent to Kesapuri camp, Majalgaon. Said Dhondabai has sold the said land admeasuring 2 H 83 R in favour of the appellant/defendant under registered sale deed for valuable consideration and since then he is in possession of the said land which is adjacent to Kesapuri camp, Majalgaon, as a owner thereof.

8. Learned counsel for the appellant/defendant submits that in R.C.S. No. 289 of 2003 (Old) and R.C.S. No. 63 of 2006 (new), the

vendor Yamunabai had filed her affidavit against the respondent/plaintiff. She affirmed in the said affidavit that respondent/plaintiff Janardhan is not in possession of suit land and the said sale deed executed by her is nominal one. Even then respondent/plaintiff Janardhan got executed the correction deed dated 11.2.2014 from vendor Yamunabai and based on the same, instituted the present R.C.S. No. 305 of 2014. Vendor Yamunabai is frequently changing her stand by filing different kind of affidavits and even by executing correction deed in favour of the respondent/plaintiff. Thus, the affidavit filed by vendor Yamunabai in respect of respondent/plaintiff Janardhan in the present suit requires no consideration. However, the lower appellate court has not considered the same and passed the impugned judgment and order.

9. The learned counsel for the respondent/plaintiff submits that the compromise decree passed in R.C.S. No. 234 of 2000 and R.C.S. No. 403 of 2001 held to be not binding on the respondent/plaintiff in the suit instituted by him bearing R.C.S. No. 289 of 2003 (old) R.C.S. No. 63 of 2006 (new). In R.C.S. No. 289 of 2003 (old)/R.C.S. No. 63 of 2016 (new), the present appellant/defendant preferred an application to implead him in the suit as party respondent and the same application came to be allowed. He had filed his written statement in the said suit and respondent/plaintiff

thereafter made amendment in the plaint. Even though the amendment was made in the said suit in terms of order passed by the court, directing the respondent/plaintiff to implead the appellant/defendant herein as defendant No.10 in the said suit, inadvertently, the respondent/plaintiff has not carried out the amendment in prayer clause seeking a relief against the present appellant/defendant alongwith other defendants in the said suit. The learned District Judge, Majalgaon has allowed Regular Civil Appeal No. 48 of 2011, merely on the basis of said lacuna and made observations to that effect in para 15 of the judgment. However, the compromise decree passed in R.C.S. Nos. 234 of 2000 and 403 of 2001 held to be not binding on the present respondent/plaintiff and as such, the land allotted to the share of Yamunabai in terms of compromise decree passed in R.C.S. No. 18 of 1991 remained intact and the respondent/plaintiff had purchased the said land from Yamunabai under registered sale deed for valuable consideration. Learned counsel submits that against the judgment and decree passed in R.C.S. No. 32 of 2004, the respondent/plaintiff has preferred Regular Civil Appeal No. 59 of 2014, which is still pending. Learned counsel submits that considering entire aspect of the case, the lower appellate court has rightly allowed Misc. Civil Appeal No. 18 of 2015 and thereby quashed and set aside the order passed by the trial court below Exh.5 and further allowed application Exh.5 in

R.C.S. No. 305 of 2014 and accordingly restrained the appellant/defendant from causing obstruction to the possession of the respondent/plaintiff over the suit land till disposal of R.C.S. No. 305 of 2014. No interference is required.

10. It is well settled that power conferred under Order XXXIX Rules 1 and 2 of C.P.C. in granting and/or refusing temporary injunction is discretionary, which is to be exercised in accordance with the reasons and sound judicial principles. Its main purpose is to preserve the subject matter of the suit in status quo for the time being. Interim orders are issued not of a grace or any default of any person but the interim order of injunction is granted on the basis of *prima facie* case made out in the pleadings and that in the interest of justice. The said interim order is necessary in order to maintain the situation as on the date or recurrence of such incidents, which were existing as on the date of presenting such application. It is also to take into consideration the balance of convenience and other important matters.

11. On careful perusal of judgment and decree passed in R.C.S. No. 63 of 2006 (new) and R.C.S. No. 289 of 2003 (old), instituted by the respondent/plaintiff, it appears that learned 2nd Joint C.J.J.D. Majalgaon has recorded finding in affirmative to issue No.1 and

accordingly held that the present respondent/plaintiff is in possession of land Gat No.11 to the extent of 1 H 27 R with boundaries as detailed in the plaint. It further appears that the said suit was strongly contested by the defendants including the present appellant/defendant. Learned C.J.J.D. has also recorded finding in affirmative and thereby held that the judgment and decree passed in R.C.S. No. 234 of 2000 and R.C.S. No. 403 of 2001 are not binding on the present respondent/plaintiff. The learned C.J.J.D. accordingly declared the present respondent/plaintiff as owner in possession of suit land and restrained the appellant/defendant therein from causing any obstruction to his peaceful possession over the suit land by decree of perpetual injunction. Though the present appellant/defendant has challenged the said judgment and decree by filing R.C.A. No. 48 of 2011, the learned District Judge, Majalgaon has set aside the said judgment and decree as against the present appellant/defendant only on the ground that no specific relief is claimed against him. However, the judgment and decree passed in said R.C.S. No. 63 of 2006 has attained finality as against the other defendants, including vendor Yamunabai, who has executed registered sale deed in respect of suit land in favour of the respondent/plaintiff. Even though the compromise decree passed in R.C.S. No. 234 of 2000 and in R.C.S. No. 403 of 2001 are not yet set aside, the said compromise decree is not binding on the present

respondent/plaintiff as per the judgment and decree passed in R.C.S. No. 63 of 2006, which has now attained finality.

12. In view of above, a strong prima facie case exist in favour of the respondent/plaintiff for protecting his possession over the suit land till disposal of suit. The respondent/plaintiff has given certain admissions in the said R.C.S. No. 63 of 2006 in respect of land owned and possessed by the appellant/defendant and the same would not come in the way to seek relief of temporary injunction. So far as judgment and decree passed in R.C.S. No. 32 of 2004 is concerned, the respondent/plaintiff has preferred Regular Civil Appeal No. 59 of 2014, which is still pending. It is necessary to mention here that the judgment and decree passed in R.C.S. No. 32 of 2004 pertains to the land admeasuring 2 H 83 R, the land purchased by the appellant/defendant from vendor Dhondabai under sale deed dated 20.11.2002. It is to be mentioned here that the compromise decree passed in R.C.S. No. 403 of 2001 instituted by said Dhondabai is held to be not binding on the present respondent/plaintiff in terms of judgment and decree passed in R.C.S. No. 63 of 2006. The respondent/plaintiff had purchased the suit land from Yamunabai under registered sale deed dated 24.2.2000. So far as the correction deed executed by Yamunabai is concerned, that is only to the extent of boundaries of the suit land towards western side,

wherein the previous owner from that side has sold his land to another person and inadvertently the name of the purchaser was not mentioned in the boundaries of sale deed executed by Yamunabai in favour of present respondent/plaintiff.

13. Even the learned Judge of the trial court has also observed in his order below Exh.5 in R.C.S. No. 305 of 2014 that, *prima facie*, it appears to the effect that the present respondent/plaintiff is in possession of the suit land. However, the learned Judge of the trial court has ignored the chequered history of litigation between the parties and given unnecessary weightage to the decree of perpetual injunction passed in R.C.S. No. 32 of 2004. The lower appellate court has rightly considered the same and observed that the respondent/plaintiff has strong *prima facie* case for issuance of order of temporary injunction in his favour. The balance of convenience lies in favour of the respondent/plaintiff and as observed by the lower court, he is likely to suffer irreparable loss if injunction is refused.

14. In view of above discussion, I do not find any fault in the impugned judgment and order passed by the Adhoc District Judge-1, Majalgaon, in Misc. Civil Appeal No. 18 of 2015. No interference is required. It is clarified that the observations made in this order are *prima facie* in nature only for the purpose of deciding the issue

involved in the present appeal from order and the lower courts shall not be influenced by the observations made in this order. Hence, I proceed to pass the following order:-

O R D E R

- I. The appeal from order is hereby dismissed. In the circumstances, there shall be no order as to costs.
- II. In view of disposal of appeal from order, pending civil application is also disposed of.

(V. K. JADHAV, J.)

rlj/