

Sequeira

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

WRIT PETITION (Stamp) NO. 4688 OF 2017

Ishwarsingh Gangasingh Chowhan & ors. .. Petitioners
Vs
Kamlesh Singh Harnamsingh Chowhan & ors. .. Respondents

Mr.P.K.Dhakephalkar – Senior Advocate a/w Jaydeep Deo, for
Petitioners.

Mr.Vivek Kantawala a/w Amey Patil i/b Vivek Kantawala & Co, for
Respondent No.1.

***CORAM : N.M.Jamdar, J.
Wednesday, 22 February 2017.***

Oral Order :

By this Petition, Petitioners have challenged the order passed by the learned Small Causes Court, Mumbai dated 19 January 2017 rejecting the application in respect of the Obstructionist Notice No.25 of 2017.

2. The Application was filed by Petitioner under Order XXI Rule 97 of the Code of Civil Procedure. The Application was rejected by the learned Small Causes Court Judge holding that Applicants cannot be termed as obstructionists and they have already filed an application under Section 47 of the Code of Civil Procedure which is pending and their application for appointment of Court

Receiver earlier has been rejected.

3. Heard Mr.P.K.Dhakephalkar, learned Senior Advocate, for Petitioners and Mr.Vivek Kantawala, learned counsel for Respondent No.1.

4. A decree has been passed in a partition suit involving both the Applicants and the Respondent – original Plaintiff in the Civil Court at Mainpuri (U.P.). The Respondent – original Plaintiff had filed R.A.E. Suit No.291/451 of 2007 seeking possession of the suit premises from the tenant. This relief was granted in favour of the Respondent – original Plaintiff, which was confirmed in further proceedings. An application was filed by the Petitioner under section 47 of Code of Civil Procedure to declare the decree passed in the R.A.E. Suit No.291/451 of 2007 as a nullity. This application filed on 27 September 2016, is pending. Thereafter the Applicant filed an application for appointment of Court Receiver over the suit premises. This application was rejected on 23 December 2016. After the dismissal of the application for appointment of Court Receiver it appears that the Applicant has taken possession of the suit premises stating that they were lying vacant.

5. Mr.Dhakephalkar submitted that Petitioners are not strangers to the property and are co-owners and are entitled to a share in the suit property. He submitted that in fact the present suit property has fallen to their share in the said partition decree. He

submitted that in view of all these circumstances, dismissal of the proceedings holding that Petitioners cannot be termed as obstructionists, is not correct in law. He relied on the decision of the Apex Court in the case of *Brahmdeo Chaudhary Vs Rishikesh Prasad Jaiswal and another* – (1997) 3 Supreme Court Cases 694. Mr.Kantawala the learned counsel for Respondent-Plaintiff, on the other hand submitted that the decree passed by the Civil Court at Mainpuri (U.P) is not yet executed and the shares are not finally demarcated therefore the Petitioners cannot claim any right in respect of the suit premises as such, and cannot illegally grab the suit property.

6. The Petitioners have invoked power of superintendence under Article 227 of the Constitution, which is an equity jurisdiction. Therefore the Court is entitled to consider the conduct of the parties. The Petitioner had earlier sought appointment of a Court Receiver in respect of the suit premises on the very same ground that the suit premises has fallen to his share. This application was rejected holding that no such right has been crystalised in favour of the Petitioner yet. Instead of taking this challenge further, the Petitioner has simply walked into the premises and has sought to obstruct the same on the ground that Petitioner is now in possession. It is sought to be contended that situation has undergone a change now that since Petitioner is in possession, but how the Petitioner came in possession, cannot be overlooked. Even assuming the Petitioner is co-owner

and he still has to show either, that the decree obtained is by way of fraud for which the Marji Application is pending or to take his challenge for appointment of Court Receiver further. Petitioner cannot unilaterally take over the possession of the premises bypassing the process of law. In these circumstances, view taken by the learned Small Causes Court Judge, Mumbai in not treating the Petitioner as an obstructionist and refusing to stay the execution of the decree on that ground, cannot be faulted. Challenge to the impugned order is rejected.

7. However, at the same time it cannot be lost sight of that the Petitioner is the co-owner of the suit property and the proceedings for execution of the decree are pending. Mr.Dhakephalkar submitted that to enable the Petitioner to take appropriate steps to safeguard Petitioner's interest as a co-owner after the Respondent – original Plaintiff takes possession of the suit property, he should be restrained from creating third party rights for some period. This submission is reasonable. Therefore, though I am not inclined to interfere with the impugned order, it is clarified that if the Respondent – original Plaintiff takes possession of the suit premises, he will not create third party rights for a period of eight weeks therefrom. The proceedings between the Petitioner and the Respondent-Plaintiff in respect of the partition decree will be decided on their own merits.

8. At this stage, Mr.Dhakephalkar seeks continuation of the

ad-interim relief. It was granted only at the production stage only yesterday. In view of the above circumstances I am not inclined to continue the ad-interim relief. Furthermore, the interest of the Petitioner is protected by placing a restraint on the Respondent in not creating third party rights for a period of eight weeks as above.

(N.M.Jamdar, J.)