

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

**APPEAL FROM ORDER (STAMP) NO.9633 OF 2017
WITH
CIVIL APPLICATION (STAMP) NO.9635 OF 2017
IN
APPEAL FROM ORDER (STAMP) NO.9633 OF 2017**

Sayaji Parvati Rane & Ors. ... Appellants/Applicants
vs.
The State of Maharashtra & Ors. ... Respondents

Mr. Rahul Kadam for the Appellants/Applicants.
Mr. Shriram Kulkarni i/b Ms. Madhura Deshmukh for the Respondent
No.4(a) to 4(f) and 5.

Coram : **A.A.Sayed, J.**
Date : 24 April 2017

P.C. :

1 The challenge in this Appeal from Order is to the interlocutory order dated 15 December 2015 passed by the lower Appellate Court, Pune, in Civil Appeal No.462 of 2015, whereby the Application (Exhibit 4) for temporary injunction against the Respondents/original Defendants is rejected with costs.

2 While dismissing the suit on 10 August 2015 the trial Court decided the issue No.3 against the Appellant/original Plaintiff. In paragraphs 26 to 29 the trial Court after considering the evidence on record observed as follows:

“26) PW1 Sayaji in his cross-examination has admitted that at the time of implementation of consolidation scheme, the consolidation authority had recorded

statements of all persons and those are forming the record of that office. He also further admitted that the statement of his father was recorded and thumb impression of his father was taken on it. He also further admitted that the consolidation authority had executed possession receipt in their favour and the possession receipt of gat no.201 (old S.No.20/1/B) was given to deceased defendant no.4. He further admitted that on 30-11-78, there was measurement of gat no.201, admeasuring 1 H 28 R. He stated that he is saying that possession of 47 R on basis of measurement map exh.298. He admits that the measurement carried out in the year 2001 do reveal that he had encroachment in 33 R land in gat no.201. He has further admitted that 33 R land in which he has encroached is area of gat no.201. He further admitted that in measurement carried out in the year 1978, 47 R land encroached upon was from gat no.201.

27) PW1 Sayaji is admitting that 47R land is from gat no.201. Unless and until the objection of plaintiffs with respect to consolidation scheme is accepted and varied, plaintiffs have to respect the prevailing consolidation scheme. If as per measurement map, plaintiffs have encroached on said 33 R land, they cannot claim any right of possession on said 33 R land. As on today as measurmeent map and consolidation scheme is in favour of defendant no.5 and as PW1 Sayaji is admitting that said portion is of gat no.201 and as gat no.201 belong to defendant no.5, plaintiffs cannot claim lawful possession in suit property against true owner i.e. defendant no.5. Even for sake of judgment, testimony of PW1 Sayaji of he in possession

of suit property is accepted for a moment, it will be unlawful possession.

28) On basis of aforesaid documents, defendant no.5 is put in possession of suit property can be safely concluded. Furthermore, the document at exh.342 clearly reveal that defendant no.5 is in possession of suit property. As there was obstruction from plaintiffs, defendant no.5 had applied to District Magistrate/ Tahasildar, Purandar. On application of defendant no.5, Tahasildar, Purandar has intimated Jejuri police station and therefore, Jejuri police station had issued letter exh.342 to plaintiffs not to obstruct the possession of defendant no.5 in suit property or they would take action. Unless defendant no.5 was in possession of suit property, application would not have been lodged with District Magistrate/Tahasildar, Purandar. This document is relied upon by plaintiffs in cross-examination of DW1 Maruti. Therefore, document at exh.342 also corroborates the testimony of DW1 Maruti on factum of possession of defendants in suit property.

29) The 7/12 extract exh.316 shows possession of defendant no.5 in suit property. The documentary evidence corroborate testimony of DW1 Maruti on factum of possession of defendant's in suit property. There is no cogent evidence on record to believe the testimony of PW1 Sayaji on the factum of possession of plaintiffs in suit property. For all discussion above, I conclude that plaintiffs failed to prove their possession in suit property. On the contrary from discussion above, it is safely concluded that defendant no.5 is handed over possession of suit property by

defendants 1 to 3. Consequently, I answer issue nos.2 and 3 in negative.”

3 The Appellant/original Plaintiff, aggrieved by the dismissal of the suit had filed a substantive Appeal and filed an Interim Application (Exhibit 4) seeking temporary injunction against the Respondents. While rejecting the Application by the impugned order dated 15 December 2015, the lower Appellate Court has observed in paragraphs 9 to 13 as follows:

“9) The Court is of the view that the plaintiff/appellant is not in possession of disputed land of 33 R in gat No.201, because already plaintiff had handed over possession to the defendant on 20/02/2004 and on the 7/12 extract the land is in the name of defendant No.5 and in the cultivation column also land is shown in the possession of Defendant No.5.

10) The plaintiff's father had never challenge consolidation scheme since 1965 and never challenged possession receipt executed before the Circle Officer.

11) Later on the present plaintiff had made encroachment in the land gat No.201. However, in 1978, he had handed over the possession of that encroached portion and again it was found that plaintiff had made encroachment in 33 R Land in gat 201 and in 2004 he had handed over possession of 33 R. Land to the defendant No.5.

12) Plaintiff had challenged the order of the Circle Officer upto the State Govt. those appeals were dismissed. The documents on record shows that the plaintiff is not in possession of the suit property there

fore on application made by the defendant to the Tahsildar the letter was issued to the Jejuri Police station, the police station issued letter to plaintiffs not to obstruct the possession of defendant no.5. Therefore, there is no any balance of convinence in favour of the plaintiff/appellant.

13) The court is of the view that there is no irreparable loss will cause to the plaintiff/appellant if the application of temporary injunction is dismissed. Hence, following order is passed:

O R D E R

The application Exh.4 for temporary injunction against defendant/respondent is rejected with costs."

4 Thus, the lower Appellate Court also while dealing with the Application prima facie found that the Appellant/original Plaintiff was not in possession of the disputed land of 33 R. in Gut No.301. In these circumstances, I do not find any reason to interfere with the discretion exercised by the lower Appellate Court refusing to grant interim injunction. It is not possible at this stage to accept the contention of the learned Counsel for the Appellant/original Plaintiff that as a matter of fact possession was never handed over to the Respondents/original Defendants on 20 February 2004 and the trial Court has not appreciated the documents on record while passing the impugned judgment and order dismissing the suit and the lower Appellate Court has also not appreciated this aspect in deciding the Application in the Appeal while passing the impugned order.

5 In **Wander Ltd. and Another vs. Antox India P. Ltd. 1990**
(Supp) Supreme Court Cases 727 it has been held by the Supreme
Court in para 13 and 14 as under:

“13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

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. Pothan Josheph:

*“... These principles are well established, but as has been observed by Viscount Simon in **Charles Osenton & Co. v. Jhanaton** '... 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.”

6 The lower Appellate Court has decided the Injunction Application within the framework of the principles mentioned in the afore-quoted judgment of the Supreme Court and the discretion exercised by the lower Appellate Court cannot be said to be arbitrary or perverse or against settled principles of law.

7 In the circumstances, the impugned order does not warrant any interference at the hands of this Court. The Appeal from order is dismissed.

8 It is however clarified that the Appeal Court while deciding the Appeal shall not be influenced by the observations made in this order. It will be open for the Appellant/original Plaintiff to apply to the lower Appellate Court to decide the Appeal expeditiously.

9 The Civil Application (Stamp) No.9635 of 2017 does not survive and the same is disposed of.

(A.A.Sayed, J.)