

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 492 OF 2017
WITH
CIVIL APPLICATION NO. 625 OF 2017

Sara Farhan Mamoon Lukmani nee Sara Elvira
Bermude

...Appellant

Versus

Jessica Iqbal Lukmani & Ors

...Respondents

Mr Girish Godbole, *a/w Mr Anupam Surve, Mrs Zai Kanade, Mr Parikshit Barpujari & Ms Poorva Garg, i/b Mulla & Mulla & CBC, for the Appellant.*

Mr Devendra Avhad, *i/b Tejal Luniya, for Respondent No. 1.*

Mr Siddhesh Bhole, *a/w Ryan Mendes & Dhruti Cheeda, i/b Haresh Jagtiani & Associates, for Respondents Nos. 2 & 3.*

Dr Birendra Saraf, *a/w Ms Ravina Rajpal, Ms Sayali T, i/b Singh & Singh Malhotra & Hegde, for Respondent No. 4.*

CORAM: G.S. PATEL, J

DATED: 31st July 2017

PC:-

1. The Appellant is the original Plaintiff. Respondents Nos. 1 to 3 were original Defendants Nos. 1 to 3 in the Court below. They are all members of one family. Defendant No. 2 is the Plaintiff's sister-in-law (her husband's sister). Defendant No. 1 is the Plaintiff's

husband's cousin's widow. She is about 82 years old and on account of her mental condition has had a guardian *ad litem* or next friend appointed. Defendant No. 3 is the adopted daughter of Defendant No. 1. Defendant No. 4 is an outsider to the family and claims to have acquired some of the properties in question under a gift deed that is said to be unregistered. The Plaintiff is supported by Respondents Nos. 1 to 3. I note this although in the order under appeal of 18th March 2017 there is an observation that one Vinod Shenoy, the guardian of Defendant No. 1, had not been joined to the suit.

2. The Plaintiff brought suit to protect certain properties that are situated at Kihim in Raigad District. There are various gat numbers involved but principally we are concerned with gat Nos. 1050, 1051, 1052, 1054 and 1057.

3. Briefly stated, the case of the Plaintiff was that the 4th Defendant had attempted to put up a row of cactus plants and a cowshed on a portion of gat No. 1050. It is the Plaintiff's case that on gat No. 1050 there is a bungalow called the Retreat shown as house No. 76, a store-room shown as No. 75 and a servant room shown as 77. On an adjacent plot 1052-A there is a house No. 266 of which the 4th Defendant claims to have acquired co-ownership rights.

4. The short point involved in this appeal is that in the two applications filed by the Plaintiff as Exhibit 5 and Exhibit 32, the Trial Court found that without sufficient particulars about the

alleged encroachment or construction it was not possible to correctly ascertain the facts and, therefore, no relief could be afforded to the Plaintiff. Both applications were disposed of by this common order. The application at Exhibit 32 sought the removal of the cactii and cowshed, while Exhibit 5 was to restrain all the Defendants from creating third party interest and disturbing the Plaintiff's joint possession of the suit properties. The suit itself was for partition.

5. By the order under appeal, the learned Civil Judge Senior Division, Alibag rejected both applications.

6. I note that in the impugned order itself in paragraph 11 the learned Judge said that it was necessary for the Plaintiff to apply for the appointment of a Court Commissioner and to bring on record the actual place of the gate, cowshed and cactus plants of which a complaint was made. The Court went so far as to say that if the Plaintiff succeeded by showing on a survey that the cowshed and cactus plants fell in gat No. 1050, she may well be entitled to an injunction against Defendant No. 4.

7. This is where matters stand today.

8. This being a partition suit, there is no doubt that the properties must be protected and that every party is both plaintiff and defendant. Defendant No. 4 himself only claims to be a co-sharer. Therefore, as far as the reliefs in Exhibit 5 are concerned, there should be no difficulty in granting an injunction restraining all

concerned from creating third party rights pending the suit. I would only modify this to say that third party rights are not to be created nor possession parted with without leave of the Court obtained after at least six weeks' notice to the Advocates for the other parties. That would correctly and sufficiently balance the rival rights and contentions in regards to the properties in question. It also goes without saying, that the possession of each of the parties is to remain undisturbed and the *status quo* as of today should continue.

9. There remains the question of what, if anything, is to be done in regard to the application for removal of the cactus plants and the cowshed and possibly, the gate. Here, I believe the Trial Court was absolutely correct in its observations that without particularization, and specifically without the boundaries of these various gat numbers being established, it is impossible for any Court — whether the Trial Court or in Appeal — to ascertain the position on the ground and to pass any meaningful order. Dr Saraf for Respondent No. 4 argues that no application was ever made by the Plaintiff for the appointment of a Court Commissioner. Be that as it may, it is undeniable that such an application can be made at any stage. In fact, even the necessity of a formal application can be dispensed with since by merely appointing a Court Commissioner no rights are being finally determined. All that will happen is that material will be brought on record necessary for the Trial Court to be able to take a considered decision. None can possibly have an objection to this. It is an order that would also, conceivably, be to the benefit of Defendant No. 4, who undoubtedly wants to get the boundaries of the property of which he claims to be a co-sharer correctly delineated.

10. In that view of the matter, I am inclined to make an order requesting the Trial Court to appoint a suitable person with sufficient local knowledge as a Court Commissioner. That Court Commissioner for local investigation will engage the services of the District Superintendent of Land Records. The DSLR will, acting on an authenticated copy of this order and of an appropriate order of the learned Civil Judge Senior Division Alibag, proceed to demarcate the boundaries of all the suit properties (i.e., all the gat numbers mentioned in the suit, not merely the ones mentioned above). I am making it clear that what is required is not a subdivision of these into sub-plots but only the establishing of the gat or plot boundaries. The findings of the DSLR are then to be incorporated in a report of the Court Commissioner which will be rendered to the Trial Court. It goes without saying that while ascertaining the boundaries, all are required to cooperate. The local police will render assistance, if necessary, to the Court Commissioner and the DSLR. The appropriate boundary markers/stones will be placed and marked. The Court Commissioner will be at liberty to take photographs on site during the process, if necessary.

11. The reason that I am not appointing the DSLR directly is to ensure that a report is properly made and is not further delayed, and that independent material can also be added as a supplement in the report of the Court Commissioner.

12. The costs of this survey and the Court Commissioner's fees will be borne by the Plaintiff. The Trial Court is requested to pass

the necessary directions on production of an authenticated copy of this order.

13. Parties will appear before the Trial Court on 28th August 2017. If possible, the Court Commissioner should submit a report by 9th October 2017.

14. Exhibit 32 is, therefore, restored to file. The Trial Court is requested to consider the application afresh based on the Commissioner's report and the demarcation by the District Superintendent of Land Records. That decision will be rendered uninfluenced by the observations in the order under appeal.

15. I am making it clear that I have not set aside the impugned order on merits but have merely tried to fashion a possible way forward where the application below Exhibit 32 by the Plaintiff can be considered on merits with sufficient material at hand.

16. The appeal and all civil applications are disposed of in these terms with liberty to the parties to apply. There will be no order as to costs.

17. All other rights and contentions are specifically kept open.

(G. S. PATEL, J)