IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.643 OF 2017

Arun Ganapati Gurav and another … Petitioners
Vs.
Shashikant Bapuso Bailkar and others … Respondents

Mr. Amit Borkar for Petitioners.
Mr. Anand S. Patil for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 07, 2017

P.C. :

Heard Mr. Borkar, learned Counsel for petitioners and Mr. Patil, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners hereinafter referred to as 'plaintiffs', have challenged the judgment and order dated 07.04.2016 passed by the learned Principal District Judge, Kolhapur in Miscellaneous Civil Appeal No.33 of 2015. By that order, the learned District Judge allowed the Miscellaneous Appeal preferred by respondent No.1, hereinafter referred to as 'defendant No.1', and quashed and set aside the judgment and orders dated 21.01.2015 below exhibits-5, 18 and 40 passed by the learned Civil Judge, Junior Division, Radhanagari. By the impugned order, the learned District Judge has set aside the orders below exhibits-5, 18 and 40. The learned Principal District Judge has dismissed applications at exhibits-5 and 40 filed by the plaintiffs and defendants No.3 and 4 respectively and allowed application exhibit-18 filed by the defendant No.1 and issued injunction restraining plaintiffs and defendants No.2 to 4 from obstructing defendant No.1's possession over the suit property pending the Suit. It is against this order, plaintiffs have instituted the present Petition.

3. Defendant No.1 filed application exhibit-18. Defendants No.3 and 4 filed application exhibit-40. By separate orders dated 21.01.2015, the learned trial Judge allowed applications exhibits-5 and 40 filed by the plaintiffs and defendants No.3 and 4 respectively and rejected application exhibit-18 filed by the defendant No.1. Aggrieved by that order, defendant No.1 preferred Miscellaneous Civil Appeal No.33 of 2015. By the impugned order, the learned District Judge has set aside the orders below exhibits 5 and 40 and also order below exhibit-18. The learned District Judge allowed application exhibit-18 and issued injunction restraining plaintiffs and defendants No.2 to 4 in Regular Civil Suit No.46 of 2013, who are defendants No.1 to 5 in the counter claim from obstructing defendant No.1's possession over the suit property pending the Suit. The learned District Judge dismissed application exhibits-5 and 40.

4. In support of this Petition, Mr. Borkar strenuously contended that the learned trial Judge rejected the application exhibit-18 filed by the defendant No.1 under Order XXXIX, Rules 1 and 2 read with Sections 94 and 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). The learned trial Judge allowed application exhibit-5 filed by the plaintiffs and application exhibit-40 filed by defendants No.3 and 4 and issued injunction restraining defendant No.1 from obstructing possession of the plaintiffs and defendants No.3 and 4 over the suit property. He submitted that the suit property is a dwelling house of the joint family. In view of Section 44 of the Transfer of Property Act, 1882 (for short 'Act'), a stranger purchaser cannot claim joint possession with the other family members. The remedy is to institute Suit for partition. He submitted that plaintiffs are in legal possession. He submitted that the suit property consists of four rooms, one toilet and one bathroom. From perusal of the affidavit dated 21.07.2014 filed by the officer of the

Forest Department, it will be clear that plaintiffs are in possession of one room, bathroom and toilet. In other words, defendant No.1 is not in exclusive possession of the suit property. Defendant No.1, therefore, cannot claim joint possession with the plaintiffs. He relied upon the following decisions:

a. ***Dorab Cawasji Warden Vs. Coomi Sorab Warden***, **(1990) 2 SCC 117**; and

b. ***Gajara Vishnu Gosavi Vs. Prakash Nanasaheb Kamble***, **(2009) 10 SCC 654**.

5. On the other hand, Mr. Patil supported the impugned order.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Plaintiffs have instituted Suit inter alia for partition and separate possession of their share; for declaration that the sale deed dated 15.09.2010 executed by defendant No.2 in favour of defendant No.1 is illegal and not binding on the plaintiffs' share; for perpetual injunction restraining defendant No.1 from causing obstruction to possession of the plaintiffs and defendants No.2 and 3 over the suit property. During the pendency of the Suit, plaintiffs took out application exhibit-5 for temporary injunction restraining defendants No.1 to 5 from causing obstruction to the possession of the plaintiffs. Defendant No.1 filed written statement and say to application exhibit-5. Defendant No.1 also set up counter claim. Defendant No.1 claimed declaration that on the basis of the sale deed dated 15.09.2010, he be declared as owner and that plaintiffs have no right, title and interest over the suit property. Defendant No.1 also sought injunction restraining plaintiffs No.1 and 2, defendants No.2 to 4 from causing obstruction to his possession over the suit property.

7. Perusal of the record shows that Ganpati (defendant No.2) is husband of Indubai (defendant No.4). Plaintiff No.1, Arun and plaintiff No.2, Mohan are sons of Ganpati and Indubai. Defendant No.3, Indubai Krishna is maternal aunt of Indubai. On 24.07.2009, defendant No.2 mortgaged the suit property to Ashok Bailkar, brother of defndant No.1. Period of mortgage was 3 years. Recitals of the Deed of Mortgage prima facie indicate that mortgagor had put the mortgagee in possession of the suit property. After the mortgage period was over, defendant No.1's brother was demanding mortgage money. Defendant No.2 decided to sell the suit property. Defendant No.2 sold the suit property to the defendant No.1 for Rs.3.75 lakhs on 15.09.2010. Both, Mortgage Deed and Sale Deed are registered instruments. The learned District Judge found that the suit property was in possession of the Forest Department when both Mortgage Deed and Sale Deed were executed. The learned District Judge further noted that documentary evidence indicated that the Forest Department paid monthly rent to the defendant No.1 after he became owner thereof. Shri N. P. Inamdar, Officer of Social Forestry has filed affidavit on record stating therein that he had handed over possession of the suit property to the defendant No.1 and then Forest Department shifted to its premises.

8. The learned District Judge found that since prior to 2010, Forest Department was in possession of the suit property and after the defendant No.1 became owner, paid its rent to the first defendant from 01.04.2011 till handing over possession. The learned District Judge considered Section 44 of the Act and in paragraph 17, observed that from the material on record, it cannot be said that the dwelling house was in occupation of the family and that it was earlier in possession of the Forest Department and the Forest Department in turn handed over

possession to the defendant No.1.

9. Mr. Borkar relied upon decisions of **Dorab Cawasji Warden** (*supra*) and **Gajara Vishnu Gosavi** (*supra*). In the case of **Dorab Cawasji Warden** (*supra*), the Suit was filed on the ground that the suit property is a dwelling house belonging to an undivided family; that there had not been any division of the said property at any time; that the appellant-plaintiff and his deceased brother Sohrab during his life time were for convenience occupying different portions. Plaintiff occupying the first floor while the deceased Sohrab was occupying the ground floor. After the death of Sohrab, respondents No.1 to 3 continued to be in occupation of that portion which was in the occupation of Sohrab, namely ground floor. In the circumstances, defendant No.4 who is a stranger to the family has no right to have joint possession or common enjoyment of the property along with the plaintiff on the basis of the purchase of the undivided share. On this ground, the appellant-plaintiff claimed that he is entitled to perpetual injunction as prayed for in the Suit. In paragraph 18, the Apex Court dealt with Section 44 of the Act. In paragraph 22, the Apex Court considered decisions of various High Courts. In paragraph 26, it was observed that the two brothers, therefore, shall be deemed to be holding the property as members of an undivided family and in the absence of the partition by metes and bounds qua this property they shall be deemed to have been holding the dwelling house as an undivided family. In my opinion, the facts obtaining in that case and in the present case are materially different.

10. In the case of **Gajara Vishnu Gosavi** (*supra*), plaintiffs sought declaration that she was owner of the western half part of the suit property, i.e. city Survey no.83 and in actual physical possession thereof, and further for restraining the defendants/respondents to cause

any obstruction to her possession over the said property and also for possession of the other part of the property. The relief was claimed on the basis that the entire C.T.S. No.83 was originally owned by Krishna Kamble and Maruti Kamble. Both brothers had been living separately and were using their respective half parts. Krishna Kamble was in possession of eastern half and Maruti Kamble was in possession of the remaining western half part. In paragraph 9, the Apex Court noted that three Courts recorded the concurrent findings of fact that partition had not been given effect to in respect of the suit property and the question was whether without partition by metes and bounds, Housabai could put her vendee Anjirabai in possession. In my opinion, the facts obtaining in that case and in the present case are materially different. In my opinion, the said decisions relied by Mr. Borkar are not applicable to the peculiar facts obtaining in the present case. On facts, it is found that Forest Department was inducted in the suit property in the year 2003. In other words, joint family was not in possession after induction of Forest Department in the suit property. This fact is recorded in the Mortgage Deed dated 24.07.2009 as also Sale Deed dated 15.09.2010.

11. Mr. Borkar relied upon affidavit dated 21.07.2014 to contend that plaintiffs are in possession of one room, toilet and bathroom. I do not find any merit in this submission. The learned District Judge has referred to affidavit of N. P. Inamdar, Officer of Social Forestry. He stated that he had handed over possession of the suit property to the defendant No.1. For the reasons recorded in paragraphs 14 to 17 of the District Court's order, I do not find that the learned District Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab