

Anand

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

WRIT PETITION NO.1173 OF 2017

Smt. Sadhana Prafulchandra Gavali & ors. .Petitioners

Vs.

Mr. Bilal Essak Parihar (since deceased) through Lrs. .Respondents
& ors.

Mr. P.K.Dhakephalkar, Senior Counsel i/b. Mr.Amol Mhatre, for the
Petitioners

Mr. Madhav Jamdar i/b. Mr. Hemant Ghadigaonkar, Advocate, for the
Respondents

CORAM : R.G.KETKAR, J.

DATE : 08.03.2017

P.C.

. Heard Mr. Dhakephalkar, learned senior counsel for the
Petitioners and Mr. Jamdar, learned counsel for the Respondents
No.1(a) to 1(d), at length.

2. On the oral Application made by Mr. Dhakephlakar, leave
to delete Respondent Nos.2 to 10 as Respondents No.1(a) to 1(d) are the
only contesting parties is granted. Amendment shall be carried out
forthwith.

3. Rule. Mr. Jamdar, waives service on behalf of the Respondents. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the constitution of India, the Petitioners, hereinafter referred to as 'Plaintiffs' have challenged the Judgment and Order dated 20.07.2016 passed by the learned 5th Jt.C.J.S.D., Pune below Exh.134 in Spl. Civil Suit No.542 of 2008. By that Order, the learned trial Judge rejected the Application made by the Plaintiffs seeking the permission for the possession, use and enjoyment of one of the vacated tenanted room i. e. room No.3 at his instance and allowing them to use and enjoyment of peaceful possession of that room situate on the Eastern side of ground floor of the main bungalow standing on the suit property bearing CTS No.807 admeasuring about 724.9 sq. mts and CTS No.808 admeasuring 814 sq. mts. at Bhavani Peth, Pune – 411 042 (For short “Suit Room”).

5. The Plaintiffs have instituted suit against the Defendant No.1 Bilal Essak Parihar. Defendant No.1 Bilal died leaving behind Respondents No.1(a) to 1(e) hereinafter, collectively referred to as

“Defendant No.1”. The Plaintiffs have instituted suit inter alia for declaration that they have right, title and interest in the suit property particularly described in para 1 of the plaint that they have a right of preemption. The plaintiffs have also claimed perpetual injunction against the Defendant No.1 from demolishing bungalow constructed in the suit premises, from obstructing the plaintiffs' peaceful use and enjoyment of the suit property, from altering or changing the nature of the suit property, from causing any construction on any portion of the suit property, from transferring, selling, creating third party rights and from inducting third person in the suit property or any part or portion thereof and from encumbering the suit property in any manner whatsoever and also from recovering rent from the existing tenants in the suit property and from recovering possession of the premises in occupation of the tenants.

6. Pending the suit, Plaintiffs took out Applications Exh.5, Exh.25 & Exh.27 claiming temporary as well as mandatory injunction. By the Judgment and Order dated 16.07.2009, the learned trial Judge allowed the Applications. Clause (1) of the operative part of the Order reads thus :

“ ORDER

The applications exh.5, 25 and 27 are hereby allowed as under :

(1) The defendant no.1 is hereby temporarily restrained from demolishing the bungalow standing on the suit property described in para 1 of the application, from carrying out the construction in the suit property, from interfering and obstructing in the plaintiff's peaceful use and enjoyment of the suit property, from transferring, selling, creating third party rights and inducting third person in the suit property, not to recover any rent or possession of the tenanted premises from the tenants till the decision of the suit.”

7. Aggrieved by this order, the Defendant No.1 preferred Appeal from Order No.795 of 2009 in this Court. Subject to the modifications of the trial Court's order, this Court dismissed Appeal from Order No.795 of 2009 on 09.11.2009. Paragraphs No.3, 4 & 5 read thus :-

“3. In my opinion, there is no need to modify the injunctions granted with respect to demolition of the bungalow carrying out construction in the suit property and from interfering or obstructing with the plaintiffs' peaceful use and enjoyment of the suit property. However, the injunction granted in respect of the transfer, sale, creating third party rights and inducting third person in the suit property must be modified. The defendant No.1 who has undivided share in the suit

property cannot be injuncted from transferring, selling or creating third party rights in respect of his undivided share in the suit property. Obviously, the third person who would be transferred the rights of the defendant No.1, if at all, would be entitled to the same rights as available in law to defendant No.1.

4. In respect of the injunction not to recover rent or possession of the tenanted premises from the tenants till the decision in the suit, in my opinion, the injunction must be modified.

5. The tenants shall deposit the rent in the Court which will remain deposited in the Court during the pendency of the suit. In the event any tenant wishes to vacate the tenanted chawl, the plaintiff or defendant No.1, at whose instance the tenant is vacating the chawl, may apply to the Court with respect to the possession of the vacated premises.”

8. In pursuance of Clause (5) of the Order dated 09.11.2009 passed by this Court (CORAM : SMT. NISHITA MHATRE, J.), the Plaintiffs filed an Application Exh.134 seeking permission to occupy suit room. Defendant No.1 opposed that Application by filing reply Exh.139 dated 27.08.2015. By the impugned order, the learned trial Judge rejected the Application principally on the ground that as per paragraph 5 of the High Court's Order dated 09.11.2009, the Plaintiffs should have filed Application before securing possession of the suit room. The Application is filed by the Plaintiffs after obtaining

possession of suit room. It is against this order, the Plaintiffs have instituted the present Petition.

9. In support of this Petition, Mr. Dhakephalkar submitted that the Applications filed by the Plaintiffs for temporary and mandatory injunctions were allowed by the trial Court. The trial Court found as a matter of fact that the Plaintiffs are in possession of the suit property. Among other injunctions, the trial Court restrained the Defendant No.1 from interfering and obstructing in the plaintiffs' peaceful use and enjoyment of the suit property. He submitted that in paragraph 3 of the Order dated 09.11.2009, this Court did not modify injunctions granted with respect to demolition of the bungalow carrying out construction in the suit property and from interfering or obstructing with the Plaintiffs' peaceful use and enjoyment of the suit property. In short, he submitted that the Plaintiffs are found to be in possession of the entire suit property and not Defendant No.1. This Court only modified injunction restraining Defendant No.1 from alienating the suit property in respect of his **undivided share in the suit property**. By paragraph 5, this Court expected that in the event any tenant vacating the tenanted chawl, the Plaintiff or Defendant No.1, at whose instance the tenant is vacating the chawl is at liberty to apply to the Court with respect to the possession of

the vacated premises.

10. Mr. Dhakephalkar submitted that in view of Section 44 of the Transfer of Property Act, 1882 (For short “Act”) as also in view of the decision of the Apex Court in the case of *Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors, 1990(2) SCC 117*, Defendant No.1 cannot claim to be in joint possession of dwelling house belonging to an undivided family. As a matter of fact, while allowing the Application for injunction, the learned trial Judge has considered this aspect in detail in paragraph 17. He, therefore, submitted that the Defendant No.1, being a stranger transferee cannot claim to be in joint possession and has remedy to institute suit for partition. He submitted that the learned trial Judge rejected the Application on the ground that the Plaintiffs filed an Application after obtaining possession of suit room. He, therefore, submitted that the impugned Order deserves to be set aside.

11. On the other hand, Mr. Jamdar supported the impugned Order. He submitted that on 26.12.2007, the Defendant No.1 had purchased 4/5 share of the Defendants No.2 to 8 and the Plaintiffs have only 1/5 share in the suit property. On 10.03.2008, the Plaintiffs have instituted the present suit. He invited my attention to paragraph 11 as

also Leave And License Agreement purportedly entered into by and between Smt. Sadhana Prafulchandra Gavali, the Plaintiff No.2 and one Anand Mahadeo Mokashi on 22.02.2008. He submitted that purported the Leave And License Agreement was for 11 months from 22.02.2008 to 21.12.2008. However, the Plaintiffs came with the case that the said Leave And License Agreement was cancelled by a Deed of Cancellation dated 03.06.2014. He submitted though the suit is initiated on 10.03.2008, there is no mention of Leave And License Agreement dated 22.02.2008. He submitted that the Leave And License Agreement and Cancellation Deed are got up documents. He submitted that as the Plaintiffs have not come to the Court with clean hands and have prayed relief on the basis of got up documents, this Court will decline their prayer by invoking powers under Article 227 of the Constitution of India.

12. He invited my attention to the reply Exh.139 filed by the Defendant No.1 and in particular, paragraphs 4, 10 to 12. He submitted that the Defendant No.1 is in possession of the portion of the suit property. In any case, as per paragraph 5 of the Order dated 09.11.2009, the Plaintiffs should have filed an Application before the tenants vacating suit room. The learned trial Judge was, therefore, justified in

rejecting the Application Exh.5.

13. I have considered rival submissions advanced by the learned counsel for the parties. I have also perused the material on record.

14. As noted earlier, the Plaintiffs have sought perpetual injunction restraining the Defendant No.1 from obstructing in the plaintiffs' peaceful use and enjoyment of the suit property. By Order dated 16.07.2009, the learned trial Judge allowed the Applications. I have already reproduced Clause (1) of the operative part of the Order. Aggrieved by that decision, the Defendant No.1 preferred Appeal from Order. This Court (CORAM : SMT. NISHITA MHATRE, J.) by Order dated 09.11.2009, subject to modifications, this Court dismissed that Appeal from Order. I have already reproduced paragraphs 3 to 5 of that Order. A perusal of paragraph 3 of the Order shows that this Court did not modify the injunctions issued by the trial Court restraining the Defendant No.1 from interfering or obstructing with the Plaintiffs' peaceful use and enjoyment of the suit property. A perusal of the trial Court's and this Court's Order does not even remotely indicate that the Defendant No.1 was found in possession some portion of the property.

15. Even otherwise, as observed earlier, in paragraph 17, the learned trial Judge in Order dated 16.07.2009 has in detail considered Section 44 of the Act as also the decision of the Apex Court in ***Dorab Cawasji Warden (Supra)***. In that case, the Apex Court considered provisions of Section 44 of the Act as also Section 4 of the Partition Act, 1893. A perusal of the High Court's Order dated 09.11.2009 and in particular, paragraph 2 of the Order shows that undisputedly, the suit property consists of a dwelling house, open space, tenanted chawl, etc. It is not in dispute that the partition of the suit property by metes and bounds is yet to be effected and in fact, the Defendant No.1 has instituted suit, being Special Civil Suit No.924 of 2010 for partition and same is pending. The Apex Court in ***Dorab Cawasji Warden (Supra)*** held that Section 44 does not give transferee of a dwelling house belonging to an undivided family a right to joint possession. The remedy is to file a suit for partition.

16. In view thereof as also having regard to the findings recorded, the learned trial Judge as also this Court, the Defendant No.1 cannot claim to be in joint possession of the suit property. As a matter of fact, the trial Court has also found that the Plaintiffs are in possession of the suit property. In that view of the matter, the Plaintiffs are entitled to

claim possession of suit room.

17. Mr. Jamdar submitted that the Leave And License Agreement dated 22.02.2008 and the Cancellation Deed dated 03.06.2014 are got up documents. As the Plaintiffs have claimed relief on the basis of got up documents, this Court will decline relief claimed in the Application. It is not possible to accept this submission as I have already held that the Plaintiffs are in possession of the suit property. Defendant No.1 is not in possession as also the Defendant No.1 cannot claim to be in joint possession any portion of the suit property. Even I accept submission of Mr. Jamdar that these documents are got up documents, nonetheless Defendant No.1 cannot claim possession of suit room. Mr. Jamdar in the alternate contended that even if these documents are held to be genuine, nonetheless the Plaintiffs did not comply paragraph 5 of this Court's Order dated 09.11.2009 and in fact are in contempt of this Court's Order. Even on this ground, they are not entitled to claim possession of suit room. I do not find any merit in this submission as well. Once the Defendant No.1 contends that the documents are genuine, then in that event as per paragraph 5 of this Court's Order, the Plaintiff was justified in applying for possession of suit room. The learned trial Judge rejected the Application only on the

ground that the Application was made after obtaining possession of suit room. Considering the matter from any angle, the Defendant No.1 cannot claim possession of suit room.

18. In view thereof, the impugned Order cannot be sustained and as such, is liable to be set aside. Application Exh.134 stands allowed. Liberty is reserved to apply to the trial Court for clubbing the suits together and for disposal in time bound manner. If such an Application is made, the learned trial Judge will pass appropriate order.

19. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R.G.KETKAR, J.)