

Anand

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

WRIT PETITION NO.12491 OF 2015

Harishchandra Maruti Desai .Petitioner

Vs.

Shamrao Hari Desai & ors. .Respondents

Mr. Suresh M. Kamble, Advocate, for the Petitioner
Mr. Sugandh B. Deshmukh, Advocate, for the Respondents

CORAM : R.G.KETKAR, J.

DATE : 10.03.2017

P.C.

. Heard Mr. Kamble, learned counsel for the Petitioner and
Mr. Deshmukh, learned counsel for the Respondents, at length.

2. Rule. Mr. Deshmukh, 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.

3. By this Petition under Article 227 of the constitution of
India, the Petitioner, hereinafter referred to as 'Plaintiff' has challenged
the Judgment and Order dated 19.08.2015 passed by the learned District

Judge-3, Kolhapur in Misc. Civil Appeal No.13 of 2015. By that order, the learned trial Judge allowed the Appeal preferred by the Respondents, hereinafter referred to as Defendants and quashed and set aside the Judgment and Order dated 30.12.2014 passed by the learned C.J.J.D., Gargoti below Exh.5 in R.C.S.No.19 of 2014. The learned District Judge dismissed the Application Exh.5 made by the Plaintiff.

4. In support of this Petition, Mr. Kamble invited my attention to Mutation Entry No.4 which was certified on 25.06.1973. He also invited my attention to the Mortgage Deed dated 10.01.1983. He submitted that if the Mutation Entry No.4 is compared with the Schedule of properties described in Mortgage Deed dated 10.01.1983, it will be clear that partition was effected in the family of the parties on 08.01.1973 and lands were distributed among the brothers accordingly. The learned trial Judge allowed the injunction Application and issued injunction restraining the Defendants from causing obstruction to the peaceful possession over the suit property as also from causing obstruction standing over the trees till the disposal of the suit. He has taken me through the paragraphs 5 to 8 of the trial Court's Order.

5. Mr. Kamble invited my attention to paragraph 9 of the impugned Order. In that paragraph, the learned District Judge referred to the documents relied upon by the Plaintiff for establishing partition in the year 1973. The learned District Judge discarded that submission by observing that “ by producing several documents Defendants have showed that, after that day also, they were having right, title, interest in that property”. The learned District Judge, however, did not discuss or refer to the documents showing the Defendants were having right, title & interest in the suit property.

6. In paragraph 10, the learned District Judge referred to the Mortgage Deed dated 10.01.1983 which was jointly executed by four brothers i. e. Maruti, Bhimrao, Namdev, Shamrao and Hari Desai. The learned District Judge observed that as the extract of index of the Mortgage Deed shows names of all the four brothers, the Defendants have prima facie succeeded in establishing that the partition was not effected in the year 1973. He submitted that this was complete misreading of the Mortgage Deed and in particular, Schedule of the properties mentioned therein.

7. On the other hand, Mr. Deshmukh supported the impugned Order. He invited my attention to paragraph 6 of the District Court's Order. The learned District Judge referred to revenue record in the form of 7x12 extracts, 8-A extracts produced by the Plaintiff and observed that these documents do not convey or extinguish any title but such documents can be used for determining possession that too only as long as contrary evidence is brought on record. In paragraph 7, the learned District Judge referred to Mutation Entry No.4. In paragraph 8, the learned District Judge noted that father of the Plaintiff, Maruti was influential person. He was having 29-30 acres land in his name. However, with a view to saving the land from acquisition, he distributed the property only on papers. The property was not divided by metes and bounds. He submitted that the learned District Judge after considering the material on record has dismissed the Application Exh.5 and therefore, no case is made out for interfering with the impugned order.

8. I have considered rival submissions advanced by Mr. Kamble. I have also perused the material on record. A perusal of Mutation Entry No.4 prima facie shows that the partition was effected on 08.01.1973 among the brothers and accordingly, lands were distributed among four brothers. A perusal of the Mortgage Deed dated

10.01.1983 and in particular, Schedule of the properties mentioned therein also prima facie substantiates the theory of partition of 08.01.1973. The learned District Judge has completely glossed over this aspect. A perusal of paragraph 9 of the impugned order shows that the learned District Judge rejected the submissions on the spacious ground that the Defendants have produced several documents showing that they have right, title and interest in the property without mentioning what those documents are. In my opinion, the learned District Judge has not properly exercised appellate powers while interfering with the trial Court's discretionary Order. In the case of ***Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727***, the Apex Court in paragraph 14 has observed as under:

“....., 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. The 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 that 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. ...”

9. Applying the principles laid down to the facts of the present case, it has to be held that the learned District Judge committed serious error in interfering with the discretionary Order passed by the learned trial Judge.

10. In view thereof, the impugned Order is set aside and the Appeal is restored to the file of the learned District Judge for deciding afresh after considering the entire material on record. The parties agree that they will appear before the learned District Judge on 20.03.2017 and for that purpose, no fresh notice will be issued to them. The learned District Judge will give a suitable date and proceed to decide the Appeal as expeditiously as possible and in any event, within eight weeks from the date so fixed. In the meantime, the status quo order dated 20.10.2015 passed by this Court (CORAM : R. M. SAVANT, J) shall remain in force. It is made clear that the observations made herein are prima facie and tentative. The learned District Judge will decide the

Appeal uninfluenced by the observations made herein.

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

(R.G.KETKAR, J.)