

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12769 OF 2016

Shri. Appasaheb Mallinath Birajdar-Patil
And Ors.

...Petitioners

Versus

Shri. Bharat Amarsingh Mansawale

...Respondent

....

Mr.A.B. Tajane, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 16th JANUARY, 2017

P.C.

1. Heard Mr.A.B. Tajane, learned Counsel for the petitioners, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the judgment and order dated 2.9.2016 passed by the learned in-charge District Judge-3, Solapur in Misc. Civil Appeal No.152/2015. By that order, the learned District Judge quashed and set aside the judgment and order dated 15.12.2014 passed by the learned 5th Jt. Civil Judge, Senior Division, Solapur below Exhibit-5 in R.C.S. No.226/2014 and dismissed

the application Exhibit-5 filed by the plaintiffs.

3. In support of this Petition, Mr. Tajane strenuously contended that after considering the material on record, by order dated 15.12.2014 the learned trial Judge partly allowed the application Exhibit-5 and issued injunction restraining defendants No.1 to 3 from causing obstruction to the plaintiffs possession without following due process of law. Aggrieved by that order, defendant No.3 preferred Appeal From Order in this Court on 19.12.2014. Though the trial Court issued injunction against defendants No.1 & 2, they did not challenge the order. He submitted that in paragraph-7 of the Civil Application, defendant No.3 pleaded thus :

“7. However, it would take quite some time for the Appeal to be finally heard and decided. In the meantime, the Respondents may continue with their continuing possession of the suit-property and/or even create third party interest.”

4. In other words, defendant No.3 admitted that the plaintiffs are in possession of the suit property and they are likely to create third party interest. Mr. Tajane further submitted

that during pendency of the appeal, defendant No.3 filed application Exhibit-19 for impleading defendants No.1 & 2 as appellants. While passing the impugned order, the learned District Judge rejected that application. He further submitted that by vacating the injunction, the suit instituted by the plaintiffs will be rendered infructuous. Apart from that, there was no ad-interim order operating during pendency of Appeal From Order in this Court. Appeal From Order was transferred to District Court at Solapur on 4.9.2015. Thus for a period of about one year and nine months, injunction was not stayed.

5. Mr. Tajane submitted that in fact in paragraph-26 of the impugned order, the learned District Judge has observed that on the basis of sale deed dated 8.8.2013 in favour of defendants No.1 & 2 *prima facie* are in possession of the suit property.

6. Mr. Tajane has further invited my attention to paragraph-24 of the impugned order and submitted that the learned District Judge has gone beyond the pleadings. While deciding the interlocutory applications, the learned District Judge was not justified in entering into merits. The learned

District Judge was also not justified in interfering with the discretionary order passed by the learned trial Judge. In support of these propositions, he relied upon the decision of this Court in ***Baban Anantrao Naik v. Sau. Pramila Uttamrao Yenare and another, 2011(6) ALL MR 15.***

7. I have considered the submissions advanced by Mr. Tajane. I have also perused the material on record. The plaintiffs have instituted suit initially praying for declaration that he has become owner by adverse possession. The plaintiffs made application Exhibit-50 for amending the plaint thereby substituting prayer clause (a). That application was allowed on 3.9.2015 and now the plaintiffs have prayed for perpetual injunction restraining defendants No.1 to 3 from dispossessing them without following due process of law. Pending the suit, they took out application under Order XXXIX Rules 1 & 2 of C.P.C. for injunction restraining defendants No.1 to 3 from creating third party interest; from causing disturbance to the plaintiffs possession over the suit property as also for mandatory injunction against defendant No.3 to remove the board as also electric connection which is taken by him

unlawfully.

8. By order dated 15.12.2014, the learned trial Judge partly allowed application Exhibit-5 and issued restraining defendants No.1 to 3 from causing obstruction to the plaintiffs possession over the suit property. Thus the only enquiry which is required to be considered is whether the plaintiffs have established their possession over the suit property. In the case of **Baban Naik** (supra), the learned Single Judge has observed in paragraph-8 thus :

“8. At the time of determination of an application for temporary injunction, the factum of possession would only be the relevant factor. Whether the possession is lawful possession or not would not be the subject matter of enquiry. Whether the amount of consideration has been paid or not, whether the plaintiff was ready and willing to perform his part of contract or not, would all be the issues which can be decided only after the parties adduce evidence. It would be premature at this stage to give findings on the said issues.”

9. Thus while deciding the application what is required to be noted is factum of possession.

10. The learned District Judge while allowing the appeal has considered the possession of the plaintiff vis-a-vis that of

the defendants. Perusal of the discussion from paragraph-17 onwards clearly shows that the learned District Judge has considered various circumstances for coming to the conclusion that the plaintiffs have failed to establish their possession over the suit property. Mr. Tajane submitted that defendants No.1 & 2 did not prefer appeal challenging the trial Court's order. In fact in Appeal preferred by defendant No.3, he filed application Exhibit-19 for impleading them as appellants which was rejected by the District Court. That apart, in paragraph-7 of Civil Application, defendant No.3 admitted possession of the plaintiffs. He further submitted that by vacating the injunction, the suit of the plaintiffs is rendered infructuous and the learned District Judge was not justified in granting injunction after more than one year and nine months. I do not find any merit in any of the submissions. The learned trial Judge without considering relevant record had granted injunction. The learned District Judge has considered material on record from paragraphs-17 onwards and has interfered with the order passed by the trial Court.

11. In the case of **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.”

12. Perusal of the trial Court order shows that the learned trial Judge has exercised the discretion arbitrarily, capriciously and perversely. The learned trial Judge ignored the principles regulating grant or refusal of injunction while deciding the application Exhibit-5. As against this, the learned District Judge was fully justified in interfering with the order passed by the

trial Court as the learned trial Judge has passed the order without considering the relevant material on record and rather ignoring the material on record. Hence no case is made out for invocation of powers under Article 227 of the Constitution of India. The petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)