

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

WRIT PETITION NO. 13400 OF 2017

Sajjan Baburao Patil	]	
Age Adult, Occ. Agriculture,	]	
R/o. Warananagar, Kodoli,	]	
Taluka Panhala, District Kolhapur	]	... Petitioner
V/s.		
1. Bhimrao Baburao Jadhav	]	
Age Adult, Occ. Agriculture,	]	
R/o. Kodoli (Chavan Galli),	]	
Taluka Panhala, District Kolhapur	]	
	]	
2. Sampat Baburao Patil	]	
Age Adult, Occ. Agriculture,	]	
R/o. Kodoli, Near Chavdi Office,	]	
Taluka Panhala, District Kolhapur	]	... Respondents

- Mr.Chetan G. Patil for the Petitioner.
- Mr.Kedar P. Lad for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 20th DECEMBER, 2017.

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith. Heard finally with consent of learned counsel for both the parties.

2] By this petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 26th October, 2017 passed by District Judge-2, Kolhapur, thereby allowing Miscellaneous Civil Appeal No.155 of 2017 preferred by

the Respondents herein, challenging the order of temporary injunction granted by the Court of Joint Civil Judge, Junior Division, Panhala, vide its order dated 29th April, 2017 passed below Exhibit-5 in R.C.S. No.32 of 2015, thereby restraining the Respondents from causing obstruction to the possession of the Petitioner over the suit property till decision of the suit.

3] For the sake of convenience, in this Writ Petition also, the parties are referred to by their original nomenclature as 'Plaintiff' and 'Defendant'.

4] Brief facts of the petition are to the effect that, the Plaintiff has filed a suit simpliciter for injunction in respect of the agricultural land bearing Gat No.2498, totally ad-measuring 1-H 32-R; out of which, he claimed to be in possession of his share ad-measuring 31.5 R with four boundaries, as given in the plaint. According to his case, the said property has fallen to his share, in pursuance of the Memorandum of Partition dated 22nd July 2003, executed by his father between him and his three sons.

5] By virtue of this Memorandum of Partition, separate portions of the land were allotted to each of them and, accordingly, eastern side portion of the land, admeasuring 31.5 R, out of the Gat No.2498, was allotted to Defendant No.2, who is

brother of the Plaintiff. However, as the Memorandum of Partition was not registered, separate entries thereof were not made in '7/12 Extract' of the agricultural land. According to the Plaintiff, all the parties had acted upon the Memorandum of Partition and each one was dealing with the property allotted to his share. Thereafter, Defendant No.2 has, on the pretext that he wanted to get loan from the Bank, got executed the Sale-Deed, bearing No.2757 of 2014, from his father, of the same portion of the said land, which was allotted in his share. On the basis of the said Sale-Deed, he executed Sale-Deed, bearing No.186 of 2015, of the same land in favour of Defendant No.1. However, in the said Sale-Deed, he has mentioned boundaries of the land allotted to his share differently and those boundaries are of the land allotted to the share of the Plaintiff. The Plaintiff is, therefore, having apprehension that, on the basis of this mis-description of the boundaries in the Sale-Deed executed by Defendant No.2 in favour of Defendant No.1, both of them will cause obstruction to his possession and hence, he is constrained to file the suit for injunction with an application for temporary injunction restraining Defendant Nos.1 and 2 from causing obstruction to his possession.

6] Defendant Nos.1 and 2 resisted the application vide their Written Statement at Exhibit-19 contending, *inter-alia*, that,

no such Memorandum of Partition was actually executed and acted upon. It was contended that, there was no such partition effected till date and whatever the Memorandum of Partition is produced on record is not legal, correct and valid. Further it was submitted that, as the Memorandum of Partition was never acted upon, the entries were also not mutated accordingly in the '7/12 Extract' of the agricultural land. According to Defendant Nos.1 and 2, the land, which came to the share of Defendant No.2, on the basis of the oral partition, is sold by Defendant No.2 in the name of Defendant No.1 and hence, the Plaintiff cannot raise any grievance about the same.

7] In support of their respective contentions, learned counsel for both the parties have relied upon their documentary evidence and on appreciation of it, the trial Court was pleased to hold that, the Memorandum of Partition dated 22nd July, 2003 appears to be executed and acted upon, as Defendant No.2 too, has, by relying on the same Memorandum of Partition, already executed Sale-Deed of his share in the joint family property in favour of wife of the Plaintiff. The original Sale-Deed to that effect was also produced on record. The trial Court has further held that, the recitals in the Sale-Deed executed by Defendant No.2 in favour of Defendant No.1 clearly reveal that, he has, by the said Sale-Deed, sold the very portion of the land, which he has

purchased from his father by Sale-Deed No.2757 of 2014 and hence, it is apparent that, not only the Memorandum of Partition was acted upon, but the property, which is sold by Defendant No.2 to Defendant No.1, was the same, which was given to his share. However, Defendant No.2 has mentioned the wrong boundaries thereof in the Sale-Deed executed in favour of Defendant No.1 and that does not disprove the possession of the Plaintiff over the suit land, which was allotted to his share by the Memorandum of Partition. Accordingly, the trial Court held the Plaintiff to be in possession of the suit property and restrained the Defendants from causing obstruction to his possession.

8] When the matter was taken before the Appellate Court, the Appellate Court has re-appreciated the entire material on record and held that, *prima-facie*, there is no material to show that the Memorandum of Partition was executed or acted upon. It was further held that, Defendant No.2 has raised cloud of suspicion over the said execution of Memorandum of Partition and in such situation, when the title of the Plaintiff is in dispute, the Plaintiff cannot become entitled to get the relief of temporary injunction. Accordingly, the Appellate Court allowed the appeal and set-aside the order of temporary injunction passed by the trial Court.

9] While challenging this impugned order of the Appellate Court, the submissions advanced by learned counsel for the Petitioner-Plaintiff are two fold: the first submission is that, the Appellate Court has acted beyond the scope of its jurisdiction and, secondly, on merits, the Plaintiff has, *prima-facie*, proved his possession over the suit property and also the fact that the Memorandum of Partition was executed and acted upon. Therefore, the Trial Court has rightly granted the relief of temporary injunction and the said relief needs to be restored by this Court.

10] Per contra, learned counsel for the Respondents-Defendants has supported the impugned order of the Appellate Court by relying upon the reasoning given by the Appellate Court and submitting that, when the trial Court has mis-directed itself by not appreciating properly the material produced on record, it was the duty of the Appellate Court to re-appreciate the same, which Appellate Court has done in this case, and hence, no interference is warranted in the impugned order of the Appellate Court.

11] As regards the scope of the Appellate Court's jurisdiction in the appeal preferred against the order of temporary injunction, which is of a discretionary nature, learned counsel for the

Plaintiff has rightly placed reliance on the judgment of the Apex Court in the case of *Wander Ltd. & Anr. vs. Antox India P. Ltd., 1990 (supp.) SCC 727*. In paragraph Nos.13 and 14 of its judgment, Hon'ble Supreme Court has considered limitation on the power of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. It was held that,

"In such appeals, 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, capriciously or perversely, or, where the Court had ignored the settled principles of law regulating grant or refusal of inter-locutory injunction. An appeal against the exercise of discretion is said to be an appeal on principle and therefore, the Appellate Court will not re-assess the material and seek to reach a conclusion different from the one reached by the Court below; if the one reached by the Court below is the one reached by that Court was reasonably possible on the material before it. 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 the 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] Thus, the law crystallized by the judgment of the Hon'ble Supreme Court is that, the power of the Appellate Court of interference, while dealing with the discretionary order passed by the trial Court, is limited. In the present case, hence, one has to consider whether the Appellate Court has exceeded its limitation by re-assessing the material on record. For that purpose, it has to be considered whether the conclusion arrived at by the trial Court was reasonably possible on the matter placed before it.

13] In this case, the Plaintiff has come before the Court with a specific case that his father had executed a Memorandum of Partition on 22nd July 2003 and in that partition, the joint family property was divided by the father amongst himself and his three sons. The area ad-measuring 31.5 R, out of Gat No.2498, with the boundaries, as mentioned therein, was allotted to the share of the Plaintiffs, which is as follows;

- ◆ On the Eastern Side - Share of Sampat Baburao Patil;
- ◆ On the Western Side - Government Road (Panand);
- ◆ On the Southern Side - Land of Bhujangrao Baburao Patil in Gat No.2498;
- ◆ On the Northern Side - Land of Laxman Gaikwad and Shiralkar.

14] Whereas, the land given to the share of Defendant No.2

is described in the said Memorandum of Partition as follows;

- ◆ On the Eastern Side - Land of Shri Balaso Patil (Khetarpure);
- ◆ On the Western Side - Share of Shri Sajjan and Bhujingrao Baburao Patil;
- ◆ On the Southern Side - Land of Shri Vilas Maruti Bavane;
- ◆ On the Northern Side - Land of Shri Shivaji Dattatray Patil.

15] Thus, out of Gat No.2498, an equal area, admeasuring 31.5 R, is allotted, each, to the Plaintiff and Defendant No.2. The share of the Plaintiff is on the Western Side to share of Defendant No.2.

16] It is pertinent to note that, thereafter, by getting the the Sale-Deed from his father, on the basis of this Memorandum of Partition, Defendant No.1 had purchased the land, which was allotted to his share in the said Memorandum of Partition. Now by executing another Sale-Deed, he has sold the same land to Defendant No.1. The recitals in the Sale-Deed executed by Defendant No.2 in favour of Defendant No.1 are very clear to that effect. In the said Sale-Deed, Defendant No.2 has categorically stated that, the land which he has purchased on the basis of the Sale-Deed No.2757/2014 is the same, which he is selling to Defendant No.2. However, while doing so, he has mentioned

different boundaries and these boundaries of the land which had gone to the share of the Plaintiff. It is clearly a mischief played by Defendant No.2 and thereby he has created an apprehension in the mind of the Plaintiff that his possession in the suit land allotted to his share may be disturbed. Naturally, in such situation, the Plaintiff was constrained to seek the relief of temporary injunction, which trial Court has rightly granted in his favour. The impugned order passed by the trial Court clearly reveals that the trial Court has considered the boundaries of the land allotted to the share of the Petitioner and Defendant No.2. The trial Court has also considered the boundaries of the land, which were mentioned in the Sale-Deed executed by Defendant No.2 in favour of Defendant No.1. The trial Court has also considered that, the Memorandum of Partition was acted upon as Defendant No.2 himself has sold the land allotted to his share by Memorandum of Partition to the wife of the Plaintiff and Mutation Entry No.7237 has been effected accordingly. There is also one more Sale-Deed executed by the father of the Plaintiff and Defendant No.2 in favour of Plaintiff's wife in respect of the land allotted to his share by the Memorandum of Partition.

17] Thus, same portion of the land, which was allotted to the share of Defendant No.2, he has sold it to the Plaintiff's wife, thereby indicating that he has acted upon the Memorandum of

Partition. Not only he, but, even the father of Defendant No.2 had acted upon the Memorandum of Partition, as he has also sold the land allotted to his share in the name of the Plaintiff's wife. In such situation, there hardly remains any substance in the contention that the Memorandum of Partition was never acted upon. The trial Court has considered this aspect also in its proper perspective. Even the averments made in the Written Statement filed on behalf of Respondent Nos.1 and 2 show that they have admitted the oral partition and thereby the separate shares in the suit land.

18] Having regard to all these facts and the material on record, the trial Court has, thus, rightly granted the relief of interim injunction. In the facts of this case, when the conclusion arrived at by the trial Court, considering the material placed before it being reasonably possible, it was not proper on the part of the Appellate Court to disturb the said order and, that too, only on the count that there is some doubt about execution of the Memorandum of Partition i.e. whether it was acted upon or not?

19] According to learned counsel for the Defendants, when the title of the Plaintiff over the suit property is under cloud of suspicion, the Appellate Court has rightly relied upon the judgment of the Apex Court in the case of *Anathula Sudhakar vs.*

P. Buchi Reddy (Dead) by LRs. & Ors., (2008) 4 SCC 594, wherein it was held that,

“Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

20] However, this Judgment cannot be made applicable in the present case, as, in this case, no one is disputing the title of the Plaintiff over the suit land. Even Defendant Nos.1 and 2 have not stated that the Plaintiff is not the owner and in possession of the land, which is allotted to his share. However, what they are doing ingenuously is, quoting different boundaries in the said Sale-Deed. When the very recitals in the Sale-Deed executed by Defendant No.2 in favour of Defendant No.1 show that, it was in respect of the share which was allotted to Defendant No.2 and sold to him by father and not of the share allotted to the Plaintiff, the Plaintiff's possession in the suit land cannot be doubted.

21] Thus, it has to be held that, the Appellate Court has mis-directed itself and entered into the issues which were not

germane to the dispute and unnecessarily interfered in the finding recorded by the trial Court, which was based on the material produced on record before it. The impugned order passed by the Appellate Court, therefore, cannot stand, on scrutiny, and hence, it is liable to be quashed and set-aside.

22] Accordingly, the Writ Petition is allowed. The impugned order passed by the Appellate Court, allowing the Miscellaneous Civil Appeal No.155 of 2017, is quashed and set-aside.

23] As a result, the order of temporary injunction passed by the trial Court below Exhibit-5 stands confirmed.

24] Rule is made absolute in the above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]