

WRIT PETITION NO.2340 OF 2017

Chabiraj s/o Ramji Naresh Singh V/s.	...	Petitioner.
Brine Stanley Rodriques and anr	...	Respondents

Mr.Sanjeev A. Sawant i/by Mr. Viral K. Rathod,for
petitioners
Mr. Atul Damle, Senior Advocate a/w Mr.Jayesh M.
Joshi, for respondents

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rd MAY, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned
counsel for the respondents.

2] By this petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 1st February, 2017, passed by District Judge-10, Thane, thereby allowing Civil Misc. Appeal No.62 of 2016, preferred by respondents herein against the order passed below Exh.5 on 12.01.2016 by the Court of 6th Civil Judge Senior Division, Thane in Special Civil Suit NO.552 of 2015.

3] The petitioner herein is the plaintiff. He has filed suit before the trial Court claiming to be in possession of the suit property,

on the basis of the will deed dated 04.08.1948, executed by the original owners Bhimaji Pannaji and Ghatmallaji in favour of Ramji Singh. Thereafter, on 8.3.1960 Ramji Singh executed will in favour of plaintiff Chabiraj. It is the case of the petitioner that in the year 2014, when he applied for certified copy of the revenue record, he realised that names of respondents were mutated in the revenue record, on the basis of the order passed by the Tahsildar on 21.1.1970, under Section 32(g) of the Bombay Tenancy and Agricultural Lands Act. It is the case of petitioner that as he is lawfully in possession of the suit land, his possession is required to be protected as the defendants intend to disturb his possession and create third party interest in the suit land.

4] Alongwith the suit, petitioner has also filed an application for interim injunction at Exh.5, which came to be allowed partly by the trial Court, restraining the respondents from creating third party interest in the suit property till the decision of the suit.

5] Being aggrieved by the said order, respondents preferred Misc. Civil Appeal, which, as stated above, came to be allowed by the Appellate Court, by the impugned judgment and order setting aside the order of interim injunction passed by the trial Court.

6] While Challenging the impugned order the submission of learned counsel for the petitioner is two fold. In the first place, it is

submitted that learned Appellate Court has not given an opportunity of hearing to the petitioner and therefore, there is breach of principles of natural justice. Hence, the matter is required to be remanded to the Appellate Court for fresh hearing of the Civil Misc. Appeal.

7] However, in my considered opinion, it is difficult to accept this contention of learned counsel for the petitioner, as the Appellate Court has given in detail as to how the matter was proceeded before it and how repeatedly, despite extending opportunity of hearing to the petitioner, petitioner's advocate failed to remain present. In paragraph No.14, the Appellate Court has observed that, the arguments of learned counsel for the appellants were heard on 11.01.2017 and on that day, on oral request of learned counsel for respondent, namely the petitioner-herein, the matter was adjourned and put up for arguments on behalf of petitioner on 21.1.2017. On that day again, learned counsel for petitioner filed adjournment application at Exh.10, on the ground that he is unwell on account of bacterial conjunctivitis and the Doctor has advised him to take rest for 4 to 5 days. Accordingly, the said application came to be allowed, but as a last chance and the matter was kept for hearing his argument on 31.1.2017. On that day, again application at Exh.11 was filed for grant of adjournment on the ground of ill health. The said application

was not supported by the medical certificate and as such it came to be rejected and matter was placed for judgment on 1.2.2017. On that day, respondent that is present petitioner through his Constituted Attorney, filed application at Exh.12 and informed the Court that transfer petition was filed by petitioner before the Principal District Judge and hence, no further order of any nature be passed in above appeal. The said application was opposed by the respondent herein and the application was filed accordingly.

8] This conduct of the petitioner and the learned counsel appearing on his behalf clearly go to show that not only sufficient, but more than sufficient opportunity was given to the petitioner to argue the matter, but instead of availing that opportunity, the petitioner has indulged into filing transfer application, thereby not allowing the Appellate Court to pass such order. This conduct, of the petitioner is reprehensible and if with such conduct the petitioner is coming to this Court and seeking remand of the matter, then it is needless to state that remand cannot be allowed on this count. It can not lie in the mouth of the petitioner to contend that sufficient opportunity was not given and there is breach of principle of natural justice. If the matter was kept prolonged on one or the other count as observed by the Appellate Court, then such litigant or his advocate does not deserve the indulgence or discretion on the part of this Court also.

9] Even otherwise, if one comes to the merits of the case, it can be seen that the trial Court has proceeded on wrong footing in observing that it was for the defendants to prove *prima facie* that their possession is legal one. It is pertinent to note that this observation is made despite holding that since 1970 the defendants are in possession as protected tenants. It is also observed by the trial Court that “since 1970 onwards plaintiff’s name was not appearing in the revenue record”. In such situation, it was not proper on the part of trial Court to grant interim relief as claimed by the petitioner.

10] Conversely, the Appellate Court has clearly observed that on the date of filing of the suit, the names of respondents are recorded as owners in revenue record. Even the correspondence with Municipal Authority, clearly shows the possession of the defendants over the suit land. Therefore, the plaintiff has failed to establish *prima facie* case. In this respect learned counsel for respondents has also relied upon some observations made in the order of the Sub Divisional Officer, Thane to show that the alleged will deed, on the basis of which petitioner is claiming ownership cannot be called as genuine.

11] In view thereof, it has to be held that, after considering all the documentary evidence, the Appellate Court has reversed the order of the trial Court and not merely on the basis of argument advanced by the appellant therein. Hence, no interference is

warranted in the said order.

12] The Writ petition, therefore, being without merit, stands dismissed.

13] At this stage, learned counsel for the petitioner seeks extension of protection granted by this Court during the pendency of the writ petition for a period of 8 weeks, which request is strongly resisted by learned counsel for respondent.

14] In my considered opinion, having regard to the above discussion, no case is made out for extension of said protection. Therefore, request made by learned counsel for the petition stands rejected.

15] It is clarified that whatever observations made hereinabove, are only for the purpose of deciding this Writ Petition and the trial Court shall not be swayed by them in any way.

[DR.SHALINI PHANSALKAR-JOSHI, J.]