

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.715 OF 2017
ALONG WITH
CIVIL APPLICATION NO.954 OF 2017

Ganpatsinh Dahyabhai Parmar and Ors. Appellants-Applicants
V/s.
Chanchalben Jaysing Solanki and Ors. Respondents

Ms. Pooja V. Thorat, a/w. Mr. Anukul B. Seth, for the Appellants-Applicants.

Mr. Mandar V. Limaye, I/by Mr. Virendra V. Pethe, for Respondent No.9.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 30TH OCTOBER, 2018.

P.C. :

1. Heard Ms. Thorat, learned counsel for the Appellants-Applicants, and Mr. Limaye, learned counsel for Respondent No.9.
2. This Appeal takes an exception to the order dated 27th February 2017 passed by the Court of Civil Judge, Senior Division, Dadra and Nagar Haveli, Silvassa, thereby dismissing the 'Application' filed by the Appellants at 'Exhibit-51' in S.C. Suit No.43 of 2014.
3. The said application was filed by the Appellants seeking the relief of interim injunction to restrain Respondent No.9, who is Original Defendant No.7 in the Suit, from carrying out any further construction in the suit property and to prevent the wasting, damaging or dispossession from the suit property till the decision of the Suit.

4. It needs to be stated that, the Appellants are Original Defendant Nos.3, 4 and 8 in the Suit filed by Respondent Nos.1 to 4, for partition and separate possession of their share in the suit property. During pendency of that Suit, the Appellants have filed this application below 'Exhibit-51' contending, *inter alia*, that, the land bearing Survey No.1085, admeasuring totally about 0.79 R, situate at Village Naroli, is one of the ancestral joint family property, in respect of which the partition and 1/6th share is claimed. Respondent No.9, i.e. Original Defendant No.7, without obtaining NA Permission or getting the 'Building Plan' sanctioned from the Competent Authority, is carrying out construction therein and, therefore, he should be restrained from doing so; otherwise, the nature of the suit property would be changed and the Appellants, who are the co-owners in respect of the said property, would be deprived from getting their share in the said land.

5. This application was resisted by Defendant No.7 contending, *inter alia*, that, he is in possession of the land bearing Survey No.1085 since the time of his forefathers and he is carrying out only the renovation work of his existing house. There is no illegal construction as such. It was submitted that, these Appellants had already filed Special Civil Suit No.41 of 2006, claiming partition and 1/6th share in this land on the basis of the 'Will Deed'. The said Suit came to be dismissed. Hence, now by putting forward the present Plaintiffs, who are his sisters, the

Appellants are claiming the same relief and, therefore, their application for interim injunction needs to be dismissed.

6. The Trial Court has, after considering the submissions advanced at bar, rejected the said application and hence, being aggrieved thereby, the present Appeal is preferred.

7. The submission of learned counsel for the Appellants is that, in a Suit for partition, the status-quo of the property is required to be preserved. If during pendency of the Suit, the nature of the property is changed, it is as good as depriving the co-owners from getting their share in the suit property. It is urged that, the Trial Court has, however, rejected the application filed by the Appellants by holding, in paragraph No.8 of its order, that, *“there are in all 13 suit properties and if, ultimately, the present Appellants succeed in having any share in the suit property, then their share can be adjusted in other ancestral joint family properties and, therefore, there is no question of any loss, much less irreparable, being caused to the present Appellants.”*

8. According to learned counsel for the Appellants, these observations made by the Trial Court and on the basis of which the order of interim relief is rejected, are not correct and proper. To substantiate her submission, learned counsel for the Appellants has relied upon the Judgment of the Hon'ble Apex Court in the case of *Maharwal Khewaji*

Trust (Regd.), Faridkot Vs. Baldev Dass, (2004) 8 SCC 488, wherein also in a Suit for possession, it was observed that,

“It would not be justified in permitting the Respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property and hence, rejection of such prayer of interim injunction, as claimed by the Plaintiff, was not proper on the part of the first Appellate Court and the High Court.”

9. Learned counsel for the Appellants has then relied upon another Judgment of the Hon'ble Apex Court in the case of *Julien Educational Trust Vs. Sourendra Kumar Roy and Others, (2010) 1 SCC 379*, wherein it was held that,

“The Appellant-Educational Trust is claiming specific performance of the 'Agreement' for purchase of land for extension of school run by it and, therefore, it was necessary to grant the relief of injunction, restraining the Respondents from changing nature and character of the suit property.”

10. Here in the case also, it is urged that, as the Suit is definitely for partition of the ancestral joint family properties, the Trial Court should have preserved the nature and status-quo of the said property, instead of rejecting the Appellants' application for temporary injunction to restrain Respondent No.9 from carrying out any construction therein.

11. It is true that, normally, in a Suit for partition, an endeavour of the Court is to ensure that the nature of the suit property, which is especially the ancestral joint family property, is not changed. Otherwise, as rightly submitted by learned counsel for the Appellants, the co-owners will not get their share in that particular property and they will be deprived therefrom.

12. However, the facts of the present case show that the Appellants herein had already filed a Suit bearing Special Civil Suit No.41 of 2006, claiming partition of their 1/6th share in this very land bearing Survey No.1085 on the basis of the 'Will Deed'. The perusal of the 'Judgment' passed in the said Suit goes to show that, it was categorically held therein that the Appellants had failed to prove their claim over the suit property, on the basis of the 'Will Deed' alleged to be executed in their favour. Therefore, prima facie, at this stage, the Appellants had failed to establish their claim over the suit land bearing Survey No.1085. Apart from that, the Original Plaintiffs i.e. the sisters of the Appellants and Respondent No.9, who had filed this Suit for partition, are not coming before the Court to restrain Respondent No.9 from carrying out construction over the suit property.

13. Moreover, in addition to this land, as observed by the Trial Court, there are other thirteen properties, which are claimed to be the ancestral joint family properties, and, therefore, even if, ultimately, it is

held that the Appellants are entitled to their share in the ancestral joint family properties, their share can be adjusted in other ancestral joint family properties. Also assuming that, Respondent No.9 completes the construction over the suit property and while passing the final decree for partition, the Executing Court comes to the conclusion that the Appellants are entitled to their share in the same land, bearing Survey No.1085, then, even by demolishing the construction, which may be carried out by Respondent No.9, the Appellants will be held entitled thereto. Therefore, there is no question of any loss, much less irreparable, to be caused to the Appellants; especially when the Appellants earlier claim over these suit properties has been rejected.

14. In view thereof, no case is made out, at-least, in this Appeal, when already, as per the case of Respondent No.9, he is not making any new construction on the suit land, but only renovation of the existing structure and the said construction is already completed. The Appeal, therefore, stands dismissed.

15. In view of the dismissal of the Appeal, Civil Application No.954 of 2017 pending therein, does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]