

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.7588 OF 2017

Prakash Haribhau Tupe	]	Petitioner
Vs.		
CITY CORPORATION LIMITED	]	
Through its Managing Director	]	
Mr. Aniruddha Pradyumn Deshpande	]	Respondent

.....

Mr. Sudhir V. Sadavarte, for Petitioner .
Mr. G.S. Godbole, Sr. Advocate i/b D.S. Patil i/b B.G. Ligade, for Respondents No.1 to 3.

.....

CORAM : R.G. KETKAR, J.

DATE : 10TH AUGUST, 2018.

P.C.

Heard M. Sadavarte, learned Counsel for the petitioner and Mr. Godbole, learned Senior Counsel for respondents No.1 to 3 at length.

2. As the Regular Court has passed 'not before me' order, the petitioner has moved this Court as per the Administrative order passed by the Hon'ble the Acting Chief Justice.

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 31st May, 2017 passed by the learned District Judge-14, Pune in Misc. Civil Appeal No.111 of 2017. By that order, the learned District Judge allowed the appeal preferred by the first respondent, hereinafter referred to as "defendant No.1" and set aside the order dated 30th March, 2017 passed by the

learned Joint Civil Judge, Junior Division, Pune below Exhibit 5 in R.C.S. No.915 of 2016. The learned District Judge rejected the application Exhibit 5 filed by the plaintiff.

4. In support of this Petition, Mr. Sadavarte strenuously contended that the suit land bearing Survey No. No.138+139+173+177+181+182+184+185+187 to 201 to 242 to 244, old Survey No.199, Hissa No.26/1A/2C/1 admeasures in all 41.23 Are. Out of that, 20 Are is the suit property, more particularly described in paragraph 1 of the plaint. He submitted that entire Old Survey No.199 admeasuring 41.23 Are was ancestral property. Sakharam Tupe had two sons namely Haribhau and Trimbak. Trimbak died leaving behind widow Anandibai, son Navnath daughters Sharada and Pushpa. Legal representatives of Haribhau sold their 50% share to defendant No.1 by way of registered sale deed dated 22nd January, 2007. On 6th November, 2015, legal representatives of Trimbak executed registered release deed in favour of the plaintiff. The plaintiff is thus owner and in possession of 20 Are which is the suit property. He submitted that on 28th October, 2005, registered development agreement was executed in favour of defendant No.1 and Correction Deed was executed on 1st December, 2005. In the Development Agreement dated 28th October, 2005, the suit property was not included and surreptitiously while executing correction deed dated 1st December, 2005, the suit property was included. He submitted that as the plaintiff is owner and in possession of the suit property, the learned District Judge was not justified in refusing injunction.

5. On the other hand, Mr. Godbole supported the impugned order. He invited my attention to paragraph 5 of the plaint. In paragraph 5, the plaintiff asserted that sale deed was executed in favour of defendant No.1 on 24th July, 2015 and the sale deed is without handing over possession as also

without payment of any consideration. Thus, the plaintiff himself is aware that sale Deed in respect of the suit property was executed in favour of defendant No.1 on 24th July, 2015. If that be so, legal representatives of Trimbak could not have executed release deed dated 6th November, 2015 in favour of the plaintiff. That apart, in view of the partition between Haribhau and Trimbak, even otherwise legal representatives of Trimbak could not have executed release deed in favour of the plaintiff who is not a co-owner. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiff claims ownership on the basis of release deed dated 6th November, 2015 executed by legal representatives of Trimbak in his favour. It is material to note that on 28th October, 2005, defendant No.2 alongwith 52 co-sharers have executed registered development agreement and also power of attorney. On 1st December, 2005, Correction Deed was also executed. It is also relevant to note that on 24th July, 2015, defendant No.1 purchased the suit property from defendant No.2 and other co-sharers. In view thereof, prima facie, plaintiff cannot claim title and also possession on the basis of release deed dated 6th November, 2015 executed in his favour by the legal representatives of Trimbak. Apart from that, it has also come on record that partition was effected between Haribhau and Trimbak. The plaintiff is admittedly son of Haribhau. Legal representatives of Haribhau had sold their share in favour of defendant No.1 on 22nd January, 2007. It is, in that context, whether the plaintiff can claim to be co-owner in 50% share of Trimbak and after his death, one of the co-owners along with legal representatives of Trimbak. Prima facie, after partition was effected between Haribhau and Trimbak, 50% share was given to Haribhau and remaining 50% share was allotted to Trimbak. Thus, prima facie, the plaintiff cannot claim to be co-owner

in respect of the suit premises. Even on this ground, legal representatives of Trimbak could not have executed release deed in favour of the plaintiff.

7. 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.”

Applying the tests laid down by the Apex Court in the case of **Wander Limited** (supra) to the facts of the present case, in my opinion, the learned District Judge rightly interfered with the order passed by the learned trial

Judge. The learned trial Judge has exercised discretion arbitrarily, capriciously or perversely. The learned trial Judge has ignored the settled principles of law regulating the grant or refusal of interlocutory injunction.

8. In view thereof, I do not find that the learned District Judge committed any error in passing the impugned order, thereby, dismissing the application Exhibit 5. Hence, Petition fails and the same is dismissed.

[R.G. KETKAR, J.]