

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5973/2018

Gangaram Vasant Sutar & Ors. ... Petitioners

V/s.

Bapu Rama Sutar & Ors. ... Respondents

Mr. Surel S. Shah for the Petitioners

Mr. Abhijeet M. Adagule for Respondent No.1.

CORAM: K.K. TATED, J.

DATED : JANUARY 14, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India, the Petitioner - Plaintiff challenges the concurrent findings of facts recorded by both the courts below and refusing to grant any interim relief restraining the Respondent - Defendant from carrying out any construction activity on the land admeasuring 115 sq.mtr. Situate at Mauje Vashi, Tq. Karveer, Dist. Kolhapur.

2 In the present proceedings, the Petitioner Plaintiff filed Regular Civil Suit No. 958/2017 before the Civil Judge, Senior Division, Kolhapur for an order of injunction restraining the Respondent Defendant from disturbing their possession in respect of the suit property. In the laternative, the Petitioner made prayer for possession of the said property. In that proceedings, the Petitioner made an Application under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 for an order of

injunction restraining the Respondent – Defendant from carrying out any construction activity in the suit property. That Application was rejected by the Trial Court by order dated 28.02.2018 on the ground that in revenue record, the Respondent – Defendant is shown as owner of the suit property.

3 Being aggrieved by the said order, the Petitioner preferred Misc. Appeal No.62/2018 which was dismissed by the appellate court by order dated 02.05.2018.

4 The learned counsel for the Petitioner submits that both the courts below erred in coming to the conclusion that the Petitioner has failed to make out any case for an order of injunction. He submits that whether the Petitioner or Respondent is in possession of the suit property is pending before the court. He submits that neither the Trial Court has given any finding about the possession of the suit property and/or Respondent has placed on record any document to that effect. He submits that even the appellate court has erred in coming to the conclusion that the Petitioner has failed to disclose the date of dispossession of the suit property. He submits that the appellate court has erred in coming to the conclusion that the Petitioner has filed the suit u/s.6 of the Specific Relief Act,1963 for possession. He submits that the Petitioner has filed the suit simplicitor for injunction restraining the Defendant from disturbing his possession of the suit property. He submits that the finding of fact given by the appellate court is contrary to the facts on record and recorded by the Trial Court in its order dated 28.02.2018. Hence, the order is liable to be set aside on this

ground alone. In support of this contention, he relies on the judgment of the apex court in the matter of ***Wander Ltd. & Anr. Vs. Antox India P. Ltd. 1990(Supp) SCC 727***. Paragraph 14 thereof reads thus:

*“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. 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, 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. 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 the 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. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph* :*

*“..... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Johnston* the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”*

The appellate judgment does not seem to defer to this principle.”

5 On the basis of this submission, the learned counsel for the Petitioner submits that both the orders passed by the Trial Court as well as the appellate court are liable to be set aside, restraining the Respondent Defendant from carrying out any construction activity on the disputed property till final disposal of the suit. He submits that if the Writ Petition is not allowed, irreparable loss and injury will be caused to the Petitioner Plaintiff.

6 On the other hand, the learned counsel for the Respondent Defendant has vehemently opposed the Writ Petition. He submits that admittedly, as on today the Respondent – Defendant is owner of the suit property. Even the revenue record supports to that effect. He submits that at the time of passing the order by the Trial Court, the Trial Court has considered these facts. He submits that the Petitioner made a specific alternate prayer in his suit for possession from the Respondent. Therefore, there is no substance in the Writ Petition. Same is liable to be dismissed with costs.

7 It is to be noted that in the present proceedings, the Petitioner has specifically made a prayer in the suit for possession of the suit property. Apart from that the revenue record stands in the name of the Respondent Defendant. Against that, the Petitioner had already preferred an appeal before the District Superintendent of Land Record, Kolhapur, which is pending. The Respondent Defendant is shown as owner of the suit property and is carrying out construction activity after

taking requisite permission from the appropriate authority.

8 The authority cited by the learned counsel for the Petitioner in the matter of *Wander Ltd. & Anr. (Supra)* is not applicable in the facts and circumstances of the present case.

9 Therefore, there is no question of interfering with the well reasoned order passed by the Trial Court.

10 Hence, the Writ Petition stands dismissed.

11 No order as to costs.

12 At this stage, the learned counsel for the Petitioner submits that the *stauts quo* order granted by this court may be continued for further period of six weeks.

13 Considering the submissions made by the learned counsel for the Petitioner, the oral request is allowed. *Status quo* order dated 05.06.2018 to continue till 13.03.2019.

(K. K. TATED, J.)