

SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14027 OF 2017

Sharad Abhimanyu Vidhate	..Petitioner.
V/s.	
Nivrutti Murlidhar Tidke	..Respondent.

Mr.Amey Deshpande for the petitioner.

None for the respondent.

CORAM : M.S.SONAK, J.

DATE : MARCH 19, 2019

ORAL JUDGMENT

Heard Mr.Amey Deshpande, learned counsel for the petitioner. The respondent, though served is, neither present nor represented by any advocate.

2. On February 28, 2019 the learned Single Judge (Coram K.K.Tated, J.) made the following order :-

“ *Heard learned Counsel for parties.*

2. *In first session, matter was argued fully by both the side. When this Court started dictating the order, at that time, the learned Counsel for the respondent submitted that matter to be kept back for some time, so that he can take instructions from his client, whether his clients want to withdraw the suit i.e. Regular Civil Suit No.169 of 2016 with liberty to proceed with their appeal which is*

pending before Collector for same cause of action.

3. *Instead of making appropriate statement, learned Counsel for the respondent submits that he wants some time to place on record certain documents.*

4. *Considering these facts, at the request of advocate for respondent one week time is granted to file additional compilation of documents with copy to other side, on payment of cost of Rs.5000/-.*

5. *Cost to be paid to the petitioner on or before 06.03.2019, failing which the defence of respondent shall struck down.*

4. *Matter to appear on board on 07.03.2019.”*

3. Today, when the matter is called out, as noted earlier, respondent is neither present personally nor is his advocate present. Taking into consideration the order dated February 20, 2019, there is no good ground to adjourn the matter any further.

4. Mr.Deshpande, learned counsel for the petitioner points out that the petitioner, who is a defendant in the suit, had applied to Sub-Divisional Officer ('the SDO' for short) complaining about the encroachment undertaken by the respondent i.e. the plaintiff in the suit. This complaint was accepted by the SDO and the SDO made orders directing the Circle Officer to evict the respondent.

5. Mr.Deshpande submits that thereupon, respondent has instituted the present suit not based on any title but seeking simplicitor injunction. He submits that since respondent has not all established any right to retain the encroached portion, learned trial Judge and the Appeal Court were not justified in granting injunction in favour of the respondent. For these reasons, Mr.Deshpande submits that the impugned orders made by the trial Court and the Appeal Court warrant interference.

6. Upon perusal of the record, it does appear that the SDO by order dated November 24, 2016 had directed the Circle Officer to evict the respondent from out of the encroached portion. Section 138(4) of the Maharashtra Land Revenue Code provides that where any person has been ejected or is about to be ejected from any lands under the provisions of sub-section (2) he may, within a period of one year from the date of the ejectment or the settlement of the boundary, institute a civil suit to establish his title thereto.

7. In the present case, the respondent has not instituted the suit R.C.S. No.169/2016 to establish his title to the suit property. The respondent is only seeking injunction on the basis of his possession. The possession is quite clearly upon the encroached portion.

8. Apart from the issue as to whether the said suit is maintainable or not, the two Courts clearly erred in protecting the

respondent's possession on the encroached portion. In such matters, though the possession is required to be protected, the plaintiff is required to demonstrate atleast a fickle of his title. Since it has not been done, the two Courts exceeded their jurisdiction in protecting the possession of the respondent on the encroached portion.

9. In any case, the two Courts were required to take into consideration the order of the SDO for determining as to whether the respondent has made out a *prima facie* case. Admittedly, the respondent has challenged but has not secured any interim order against of SDO's order. It means that the SDO's order continued to hold the field till date. A perusal of the SDO's order is sufficient to hold that respondent had failed to make out a *prima facie* case.

10. For the aforesaid reasons, the impugned orders dated January 4, 2017 and June 28, 2017 are hereby set aside.

11. Rule is made absolute in terms of prayer clause (a).

12. There shall be no order as to costs.

(M.S.SONAK, J.)