

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 52 OF 2021
WITH
INT. APPLICATION NO. 469 OF 2021

Santosh Prabhakar Upadhyay & Ors. .. Appellants

Versus

Anil Prabhakar Upadhyay .. Respondent

-
- Mr. Amresh Sharma i/by Mr. Ravi Shrivastav for the Appellants
 - Mr. Mukesh Kumar Mishra for the Respondent
-

CORAM : MILIND N. JADHAV, J.

DATE : MAY 7, 2021.
(Through Video Conferencing)

P.C.:

Heard learned counsel appearing for the respective parties. Learned counsel for the parties have been extremely fair to the Court in making pointed submissions in agitating their case.

2. Appellant Nos. 1 to 5 are the siblings of Respondent who is the original Plaintiff. Suit No. 903 of 2020 has been filed by the original Plaintiff against Appellant Nos. 1 to 5 to restrain them from entering into the suit premises namely Room No. 130, Seksaria Chawl, Govind Nagar, Haji Bapu

Road, Malad (E), Near Shiv Archana Building, Mumbai 400 097.

3. It is contended by Mr. Sharma, learned counsel appearing for Appellant Nos. 1 to 5 that the impugned order restrains the Appellants / siblings from visiting the suit premises. He submitted that there is an emotional attachment to the suit premises because the father and mother of the Appellants were residing with the Respondent i.e the original Plaintiff in the suit premises and occasionally the siblings and their family members used to visit the said place. He very fairly submitted that the Appellants are all well settled in their separate respective residences all around Mumbai and there is no animosity or fight at present to snatch the suit property and / or the residence from the Respondent whatsoever. In fact, the original suit filed by the Respondent Plaintiff is only for restraining the Appellants from visiting the suit premises. He therefore submitted that on occasions like festivals which are celebrated by the members of the family jointly, the Appellants and their families would like to visit the family of the Respondent in the suit premises.

4. *PER CONTRA*, Mr. Mishra, learned counsel for the Respondent i.e Original Palintiff submitted that there is no apparent quarrel between the Appellants and the Respondent. He submitted that the father and mother of the Appellants were residing with him in the suit premises for almost 15 years. Father expired on 23.07.2019 whereas the mother expired on 06.05.2020. The suit premises i.e Room No. 130 is in the name of the mother as tenant. The mother has left a will dated 12.10.2019 in respect of which the Respondent i.e the original Plaintiff has filed a Probate Petition (L) No. 4845/2020 in this Court. He submitted that the Probate Petition will take its own course and on adjudication whatever will be the outcome, the same would be acceptable to the Respondent i.e the original Plaintiff. Similarly, Mr. Sharma on instructions submitted that whatever may be the outcome of the pending litigation i.e the Probate Petition, they shall abide by the orders of the Court.

5. Mr. Mishra very candidly submitted that there is animosity amongst the siblings at present as the Appellants never visited the parents when they were staying in the suit premises and therefore, it would not be proper for his client

to allow visitation rights as claimed by the Appellants. Prima facie reading of the impugned order also suggest that there is animosity amongst the siblings and complaints have been filed in the police station in respect thereof. In so far as the issue of dispossession from the suit premises is concerned, certainly once the will is probated, it will take its own course in accordance with law. Hence, I find that the findings given in paragraphs 5 to 10 of the order dated 14.12.2020 are given after proper application of mind in the present facts and circumstances of the case. The impugned order is therefore sustained. Findings returned in paragraph Nos. 5 to 10 of the impugned order are extracted as under:-

"REASONS

Point Nos.1 to 3 :

5. I have heard the Learned Advocate for the plaintiff, who submitted that the father and mother of the plaintiff and defendants were tenants in respect of the suit premises. At the time of their death, only the plaintiff was residing with them at the suit premises. The mother of plaintiff has executed Will and bequeathed the tenancy rights in favour of the plaintiff. It is further submitted by him that the plaintiff continued to be in possession of the suit premises. The defendants have not denied the possession of the plaintiff. He submitted that plaintiff has placed on record sufficient documentary evidence showing his possession. He submitted that all the defendants are staying separately and they are trying to dispossess the plaintiff. He submitted that the plaintiff has made out a prima facie case, the balance of convenience also lies in his favour and the plaintiff would suffer irreparable loss, in case of refusal of injunction as claimed by the plaintiff. In so far as, maintainability of suit simplicitor for injunction is concerned, he has placed his reliance upon the decision in the case of **Shri. Surya Ramchandra Naik and Anr. V/s Smt. Suxila Tukaram Naik & Anr., 2014 (6) ALL MR 113**, wherein, it is held that suit for injunction simplicitor without seeking a further relief of declaration is maintainable. Lastly, he prayed to allow the Notice of Motion.

6. On the other hand, the Learned Advocate for the defendants argued that, the father of the plaintiff and defendants were tenants in respect of the suit premises. The plaintiff is relying on forged Will Deed, which has been never been executed by their mother. It is further submitted that plaintiff is not coming before with clean hands. He,

therefore, prayed to dismiss the Notice of Motion.

7. Having heard the learned advocate for the plaintiff and defendants, I have gone through the Notice of Motion, affidavit filed in support thereof, Written Statement tendered by defendant Nos. 1 to 5 and supporting documents placed on record.

8. It is not in dispute that the plaintiff and defendants are the real brothers and the sisters. It is also not in dispute that the late father and mother of the plaintiff and defendants were having tenancy rights in respect of the suit premises. The plaintiff is coming with the case that their late mother Smt. Suman Prabhakar Upadhyay executed Will dated 12th October, 2019, whereby she bequeathed her tenancy rights vested in suit premises to the plaintiff. To support his contention, the plaintiff has placed on record Notarized Will Deed alleged to have been executed by mother of the plaintiff and defendants. The said Will appears to be attested by two witnesses. The said Will Deed is not yet probated. It is settled law that unless the Will is probated, the Administrator of Will shall not establish his claim.

9. It is the case of the plaintiff that, he is in exclusive possession of the suit premises. Admittedly, all the defendants are residing separately. The plaintiff has also placed on record the copy of Adhar Card, Pan Card, Election Identity Card, Electricity Bill, Gas connection at the address of suit premises. The above documents, prima facie, show that the plaintiff is in use and occupation of the suit premises. The plaintiff has prima facie established that, he is in exclusive possession of the suit premises. The plaintiff is having apprehension of dispossession from the suit premises at the hands of defendants. He has also made complaint to the Police Station stating that defendants are trying to dispossess him.

10. Considering the documents placed on record by the plaintiff, the plaintiff has prima facie establish that he is in possession of the suit premises. Till the rights of the plaintiff and defendants are adjudicated in respect the suit premises, it is necessary to protect the possession of plaintiff. I, therefore, hold that plaintiff has made out a prima facie case, the balance of convenience also lies in his favour and the plaintiff would suffer irreparable loss, if injunction as prayed is refused. On the other hand, no loss would be caused to the defendants, if the injunction as prayed is granted, as they are residing separately in their owned houses. Accordingly, I, answer point Nos. 1 to 3 in the affirmative and in answer to point No.4, I proceed to pass following order:"

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6. In view of the above discussion and findings the Appeal from Order stands dismissed with no order as to costs.

7. In view of the disposal of the Appeal from Order, nothing survives in Interim Application No. 469 of 2021. The

same also stands disposed of.

[MILIND N. JADHAV, J.]