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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT Petition NO. 6570 OF 2018

Sou. Satyabhama Dada Vagare and anotherPetitioners

V/s.

Shri. Ramchandra Neminath Mohite and othersRespondents

Mr. Mahadeo A. Choudhari for the Petitioners

Mr. R. A. Thorat, Senior Advocate i/b Mr. Surel Shah for Respondent
no. 1

Mr. Anand S. Kulkarni for Respondent nos. 2 & 3

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 3, 2021.

P.C.:

1] This Petition is by Defendant Nos. 1 and 2 to Special Civil Suit No 35 of 2018 pending on the file of Civil Judge Senior Division, Solapur seeking an injunction from disturbing the peaceful possession of the Plaintiff over the Suit property.

2] Respondent No 1 filed the aforesaid Suit alleging that property was owned by his wife Padmabai and Defendant Nos 3 and 4 are

daughters having undivided share. Said daughters filed R.C.S. No. 865 of 2001 for partition and separate possession. Ex-parte Decree passed in the said Suit was set aside at the behest of Respondent No 1. on 22nd November 2011 which order was confirmed up to this court. As such Suit No 865 of 2001 preferred by Respondent Nos. 2 and 3 for partition and separate possession is pending adjudication before the Civil Court. Respondent-Defendant Shobha on 30th August 2007 executed sale deed of one-third undivided share of the Suit property i.e. 1H. 51R in favour of Petitioner. Respondent No 1 as such initiated Suit No. 205 of 2007 for setting aside said sale deed and for injunction from disturbing the possession. Said Suit No 205 of 2007 was later on withdrawn with the liberty to pursue partition Suit No 865 of 2001.

3] Before setting aside of ex-parte Decree for partition, in the execution of said ex-parte Decree for partition at the behest of Defendant Shobha, order of share division chart was made. Said order was set aside by S.D.O. at the behest of Respondent No 1 i.e. father of Shobha.

4] Based on the sale deed dated 30th August 2007 executed by Defendant Shobha in favour of other Defendant-Petitioner, prayer of mutation was rejected.

5] It is claimed that inspite of the fact that possession was never handed over to Petitioners-Defendant Nos. 1 and 2 by Shobha as expressly provided in the sale deed, Petitioner started interfering with the possession of Respondent No. 1-Plaintiff. As such Suit for injunction.

6] Along with the Suit, Application Exhibit 5 for grant of temporary injunction came to be moved which was rejected by an order dated 7th February 2018.

7] Plaintiff-Respondent No. 1, feeling aggrieved, preferred Civil Miscellaneous Appeal No. 27 of 2018, which was allowed vide impugned order dated 23rd April 2018. Hence this Petition.

8] Shri Chaudhari, learned counsel for the Petitioner would urge that Appellate Court committed an error in granting injunction as according to him Petitioner by virtue of his title to the Suit property accrued vide sale deed dated 30th August 2007 and in execution of the partition Decree, vide division chart which is produced at exhibit 'G' claimed that Petitioner remained in lawful possession of the Suit property. According to him co-owner Shobha has every right to sell undivided share, even if the ex-parte Decree for partition was set aside as such unless Petitioner is lawfully dispossessed, Respondent-Plaintiff cannot claim injunction. Learned counsel then would urge that as far as a Respondent No. 1-Plaintiff is concerned, Petitioner is nowhere disturbing his possession as he has right, title and interest to the extent of 1/3 of Suit property by virtue of sale deed. That being so, he is in lawful possession of the Suit property which fact is failed to be appreciated by the court below.

9] He would invite attention to Gat No 811/1 which he claimed to be in possession of by virtue of execution of the ex-parte partition

Decree and as such according to him his possession needs to be protected. A further contention is, even if the partition Decree is set aside, unless lawful possession handed over to Petitioner is taken away, Petitioner cannot seek injunction.

10] Shri Thorat learned senior counsel assisted by Mr. Surel Shah would support the order impugned.

11] By inviting attention of this court to the recitals in the sale deed dated 30th August 2007, it is claimed that possession of the Suit property was never handed over to the Petitioner by Defendant Shobha as she was never in exclusive or otherwise possession of the Suit property as it is apparent on the record that Plaintiff-Respondent is owner and in possession of Suit property by succession. That being so, Appellate Court was justified in quashing the order of refusal of injunction and thereby granting injunction.

12] Considered the rival submissions.

13] Petitioners' case is based on sale deed dated 30th August 2007, measurement chart, measurement carried on 26th March 2008, affidavit of adjoining landowners sworn on 24th January 2018 which are produced collectively from page No 69 onwards.

14] It is the claim of the Petitioner that by virtue of title vested in him through Shobha and Shobha having succeeded in partition Suit, Petitioner was put in possession of the land Gat No 811/1.

15] If the aforesaid submissions are appreciated, it is apparent from the record that land Gat No 811 is admeasuring 4 H. and 40R + 12R Pot Kharab land. In 2001 Suit for partition being 865 of 2001 was initiated which was Decreed ex-parte on 19th August 2005. An application for setting aside the said Decree with condonation of delay moved by the Respondent No 1-Plaintiff though was initially dismissed, however, after delay was condoned by High Court, said Decree was set aside on 22nd November 2011.

16] In the intervening period, predecessor in title of the Petitioner filed proceedings for execution of the partition Decree and Tahsildar on 24th August 2009 prepared a partition chart. Petitioner filed an application for including his name in the revenue record which was rejected. Partition chart as was drawn by Tahsildar was set aside by S.D.O, on 21st December 2009. Appeal preferred by present Petitioners before collector also came to be dismissed on 5th December 2011.

Hence, neither there exist a partition decree nor in execution thereof, Petitioner can claim lawful possession based on the same.

17] As a consequence of setting aside of the Decree for partition Suit for partition being R.C.S No. 865 of 2001 remains pending adjudication.

18] As such it can be inferred that in action taken pursuant to the ex-parte partition Decree, in the execution by the revenue authorities, the Petitioner cannot be said to have received possession. There is no mutation in favour of the Petitioner of the Suit property.

Apart from above, it cannot be inferred from the document particularly measurement chart that the Petitioners were put in possession of the Suit property as no possession receipt to that effect can be inferred.

19] Fact remains that sale deed of which recitals are unambiguous speaks of possession was never handed over to the Petitioner by predecessor in title Shobha.

20] In the aforesaid background, i.e. factual possession, recitals in the sale deed, revenue entries, in my opinion, Appellate court was justified in passing order impugned. Claim of the Petitioner that his possession can be justified based on measurement report and the affidavits of the adjoining land owners cannot be accepted. Petition as such fails stands dismissed.

21] At this stage, Shri. Choudhary, learned counsel for the Petitioner submits that he would like to challenge the order passed by

this Court before the Hon'ble Apex Court. As such it is prayed that interim order passed by this Court be continued for a period of four weeks.

22] In the wake of observations made in the order hereinabove, it will be appropriate to continue the interim relief. As such, interim relief is continue for a period of 4 weeks from today.

[NITIN W. SAMBRE, J.]