



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10871 OF 2022

Smt. Bhimabai Balaso Powar (Deceased)
through her legal heir Anil
Balaso Powar and Ors.

.....Petitioners

V/s.

Ramchandra Maruti Mohite and Ors.

.....Respondents

Mr. Yuvraj Narvankar for the Petitioner.
Mr. Surel S. Shah a/w. Ms. Vrushali Maindad i/b Mr. Swaroop Karade for the
Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : 10th AUGUST, 2023.

PRONOUNCED ON: 28th AUGUST, 2023.

P. C.

1. The petition questions the order dated 5th August, 2022 passed by the Appellate Court in Misc. Civil Appeal No. 207/2019 dismissing the appeal and confirming the order of the trial Court dated 23rd October, 2019. For sake of convenience parties are referred to by their status before the trial court.

2. Regular Civil Suit No.254/2019 was instituted by the petitioner-plaintiff for perpetual injunction restraining the respondents-defendants from interfering with the plaintiff's possession of the suit property without following due process of law. The suit property is described as property No. 854 admeasuring 7000 sq. ft. and old demolished construction admeasuring 1311 square feet on which was situated an RCC house and temporary house, which is presently an open space situated at Kolhapur. The case of the plaintiff is that an oral exchange of properties had taken place between the mother of plaintiff No.1 Tarabai with the defendant No.1 in the year 1980 and subsequently by virtue of an oral agreement, the said Tarabai had handed over the ownership and possession of the property to the husband of plaintiff No.1. It is pleaded that the assessment records bears the name of the Plaintiff No 1 and her husband and property tax is being borne by the plaintiffs even today and that the electric connection is the name of the husband of plaintiff No.1 and dues are being paid by the plaintiffs. The case of the Plaintiffs is that the Defendant No 1 had released all rights in the suit property in favour of Tarabai and husband of the Plaintiff No 1, and, the present Plaintiffs.

3. It is pleaded that the plaintiff and defendant No.1 were known to

each other and attempt was made by the Defendant No 1 to assert ownership over the suit property which was later withdrawn. It is further pleaded that as the building situated on the suit property had become old, the plaintiff was proposing to build a new building and defendant No.1 assured to lend assistance and as such the plaintiff and defendant no.1 jointly made plans as regards the proposed construction and the sanctions which were required for the same. It is further pleaded that as the old house was required to be demolished, the Defendant No.1 brought JCB to the suit property and demolished the old structure. It is pleaded that to ensure that there is no encroachment upon demolition, the plaintiff No.2 constructed a temporary shed on the suit property and as such the plaintiff has never released his possession over the suit property. The cause of action is stated to have arisen on 23rd February, 2019 when Plaintiff No 2 called for construction material for the purpose of building a temporary hut and defendant No.1 attempted to dispossess the plaintiff from the suit property.

4. In these proceedings, application came to be filed below Exhibit 5 seeking temporary injunction which was opposed by the defendants contending that the suit property had been purchased by the defendant No.1

from one Jaysingh Gurav by registered deed dated 29th November, 2014. It is contended that there was an agreement for sale dated 22nd July, 2011, however, even prior to that the suit property was in possession of defendant No.1. It is further contended that as financial condition of the husband of plaintiff No.1 was not good, defendant No.1 who is the brother-in-law of the husband of plaintiff No.1 permitted the plaintiffs to reside on the property bought by defendant No.1 from Jaysingh Rathod as gratuitous licensee. It was denied that there was any oral exchange deed in the year 1980 or that possession or ownership was transferred to Tarabai. It was contended that on 5th January, 2019 the Plaintiffs handed over possession of the suit property to the Defendant No.1 as was the Defendant No 1 intended to sell the same and the suit property was sold by Defendant No 1 to Defendant No 2 on 14th January, 2019 and the old structure was demolished by Defendant No 1 to pave way for construction of new structure by Defendant No 2.

5. The trial Court by order dated 23rd October, 2019 rejected the application below Exhibit 5 which was carried into appeal being MCA No.207/2019 which came to be rejected by the impugned order dated 5th August, 2022 giving rise to the present petition.

6. Heard Mr. Yuvraj Narvankar, learned counsel for petitioner and Mr. Surel S. Shah , learned counsel for respondents.

7. Mr. Narwankar, learned counsel for the petitioner submits that the assessment extract as well as the electricity bill is in the name of the husband of plaintiff No.1. He would further contend that specific assertion is made that after the whole building was demolished the plaintiff No.2 was residing in a temporary shed and the possession was never parted with. He would further submit that the trial Court delved into the issue of title and has observed that the case of the plaintiff is as regards the exchange of property as well as oral sale is in respect of property whose valuation is exceeding Rs.100/-. He would further point out that the trial Court has taken into consideration the registered sale deed of the year 2014 produced by the defendant and has doubted the genuineness of the oral exchange deed. He would urge that the appellate Court observed that admittedly prior to demolition of house, plaintiffs were in possession of the house on the suit property but has rejected the application on the ground that on the date of the suit there was no evidence to show the presence of any hut or shed belonging to the plaintiff on the suit property.

8. In support of his submission he relied upon the decision of the Apex Court in the case of *Krishna Ram Mahale (Dead) by his LRS v. Mrs. Shobha Venkat Rao (1989) 4 Supreme Court Cases 131* and *Anathula Sudhakar v.P. Buchi Reddy (Dead) by LRS and Ors., (2008) 4 Supreme Court Cases 594*.

9. *Per contra*, Mr. Shah, learned counsel for the Respondent submits that there can be no interim injunction against the true owners. He further submits that the plaint itself shows that the property is presently an open space and that it is the own contention of the plaintiff that the property has been demolished by defendant No.1. He would further contend that there is specific plea taken by the defendant in the written statement that the plaintiffs were gratuitous licensee. He would urge that final relief cannot be granted at the interim stage. In support of his submission he relied upon the decision of *Maria Margarida Sequeira Fernandes & Ors. v. Erasmo Jack De Sequeira (Dead) through LRS, (2012) 5 Supreme Court Cases 370*.

10. Considered the submissions and perused the papers with the assistance of learned counsel for the parties.

11. The plaintiffs have come with the case that the plaintiff No.1's mother Tarabai and defendant No.1 had entered into an oral exchange deed in the year 1980 pursuant to which the suit property was handed over to Tarabai, who subsequently by way of an oral agreement handed over the ownership as well as possession of the suit property to the husband of plaintiff No.1. The case pleaded is that the property taxes and electricity bills were issued in name of the Plaintiffs. The cause of action is stated to have arisen subsequent to the demolition of the house, when the plaintiffs was in process of rebuilding the temporary hut on the suit land, the defendants attempted to dispossess them. Pertinently, the suit has not been filed seeking declaration of title and only seeks an order of injunction not to dispossess the plaintiffs without due process of law. By interim application, temporary injunction is sought restraining the Defendants from interfering with the possession of the Plaintiffs.

12. The instant suit is one for bare injunction qua possession qua the suit property. The suit property has been described in the plaint itself as presently a vacant site. The Plaintiff's case is that on 4th February, 2019 the Defendant No 1 has demolished the old structure and that to prevent encroachment he constructed a temporary shed on the suit property and was

residing there.

13. For purpose of grant of injunction issues which will be required to be *prima facie* established is the construction of temporary shed which was in possession of the Plaintiff on date of filing of suit and if that is not established as the suit property is described as vacant site the Plaintiff has to necessarily demonstrate title to suit property and as a sequitur prove possession on the date of filing of suit. The cardinal legal position with regard to possession qua vacant site is possession follows title. In the background of the above position of law it will first have to be seen whether the suit property is vacant site or temporary shed had been constructed. In the plaint the suit property has been described as vacant site, however, in the pleadings it is stated that a temporary shed had been constructed. The Plaintiff's case is that on 23rd February, 2019, the Plaintiff was obstructed by the Defendant Nos 1 to 4 when he was bringing material to construct a small hut on the property. It is an admitted position that previously the suit property included constructed structures and the Plaintiffs have produced the assessment extracts, electricity bills etc to prove possession of the constructed structures. That was the position prior to the demolition of the structure. It will have to be *prima facie* demonstrated by the Plaintiffs that

there was a structure albeit temporary built on the suit property which was in possession of the Plaintiff after demolition of the previous structures. In that respect if we examine the material produced on record, the tax receipts are produced to show the name of the Plaintiff in the assessment extract and payment of assessment taxes, the water bills for certain years from 2004 to 2015. The documents produced on record coupled with the admission of the Defendant No 1 that the Plaintiffs were permitted to reside in the structure constructed on the suit property would *prima facie* establish that till the construction was demolished the suit property was in possession of the Plaintiffs. However as the structure was demolished, the Plaintiffs have to either *prima facie* establish their continued possession by construction of temporary shed or establish title to property, without which the issue of interim relief cannot be concluded in favour of Plaintiffs.

14. From perusal of the findings of the trial court it appears that in support of their contentions that temporary shed was constructed, the Plaintiffs have filed Affidavits of different persons, the contents whereof are more or less reiteration of plaint. Apart from bare words there is nothing on record to demonstrate that temporary shed was constructed. On the contrary the plaint

describes the suit property as presently vacant land. The least expected was to set out the details and manner of construction of temporary shed and photographs to indicate that the property is not vacant site. However there is no such material produced on record. The Plaintiffs have admitted that on 23rd February, 2019 material was being brought on site for construction of temporary hut for purpose of residence on his family members. *Prima facie* it appears that the temporary hut was sought to be constructed when the material was brought by the Plaintiff and not prior thereto.

15. As the Plaintiffs have failed to *prima facie* demonstrate that there was construction of temporary shed, in order to protect their possession of the vacant site the issue of title will have to *prima facie* gone into. For that purpose if we examine the case of the Plaintiffs, the Plaintiffs claim to title is on the basis of oral exchange deed executed between Tarabai and the Defendant no 1 in the year 1980 and the subsequent oral agreement between the husband of Plaintiff No 1 and the said Tarabai. There is no documentary evidence produced on record to demonstrate that the title in the suit property had validly passed to Tarabai. The case of Plaintiffs is of oral exchange and as such it was necessary to give the details of the properties which were exchanged.

However the pleadings are only in respect of the suit property. The Plaintiffs have come with a case of oral transactions of the year 1980. Although the valuation is not pleaded a judicial note can be taken of the position that even in the year 1980 the suit property which is shown to be admeasuring 7000 square feet will not be valued below Rs 100/. The provisions of Section 17 of The Registration Act, 1908 requires the document to be mandatorily registered. On the other hand there is registered sale deed of the year 2014 executed in favour of the Defendant No 1 by one Jaysingh Gurav. In my view, the trial Court has rightly examined the issue of title as the suit property is described as vacant site and has *prima facie* observed that the two oral transactions are in respect of property which are not valued below Rs 100/ and that the Defendant No 1 has produced on record a registered sale deed of the year 2014. In this context, it will be beneficial to refer to the decision of the Apex Court in the case of ***Anathula Sudhakar vs P. Buchi Reddy & Ors (supra)***, where the Apex Court in paragraph 16 held thus:

"But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of

possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs."

16. Even if the admission of the Defendant No 1 is accepted that the Defendant No 1 was in possession of the suit property prior to the execution of the sale deed in the year 2014 and has put the Plaintiffs in possession, as the Plaintiffs have failed to *prima facie* show title to the suit property, after demolition of the constructed structure the Plaintiffs cannot *prima facie* be said to be in possession of the vacant site as in case of vacant site possession follows title. As it is not demonstrated that any temporary shed was constructed for residence by the Plaintiffs, there is no question of irreparable loss being caused to the Plaintiffs. The Defendant No 1 by way of registered sale deed executed in the year 2019 has parted with the possession of suit property in favour of the Defendant No 2 and as such balance of convenience is in favour of the Defendants.

17. The Appellate Court while upholding the findings of the Trial Court has considered the assessment extracts and has rightly held that the assessment extract is prepared only for purpose of recovery of taxes and that the grampanchayat extract only indicates residence of plaintiffs in said house and there is no document produced to show title. The Appellate Court also considered the photographs of the suit property which discloses that there is no building in the suit property.

18. As to whether the Plaintiffs had surrendered possession on 5th January, 2019 will have to be considered after evidence has been led. At this stage there is word against word in as much as it is claimed by the Plaintiffs that the Plaintiffs had not parted with possession and the Defendant No. 1 claims that on 5th January, 2019 the Plaintiffs handed over possession which was then handed over to Defendant No 2 on 14th January, 2019.

19. As regards the decisions relied upon by learned counsel for Petitioner, in the case of *Krishna Ram Mahale vs Mrs. Shobha Venkat Rao (supra)*, the Apex Court has held that the law requires the true owner should dispossess the trespasser by taking recourse to the remedies under the law. In

the case before the Apex Court the occupant was in possession of the premises and business conducted therein and the landlord had dispossessed the licensee. In the instant case, as discussed above, the suit property appears to be vacant site and the decision does not assist the case of the Petitioner.

20. Having regard to the discussion above, in my opinion, there is no warrant for interference with the concurrent findings of the trial court and appellate court. As such the Petition fails and stands dismissed. Needless to clarify that the observations made herein are only *prima facie* observations and the Trial Court to decide the suit on its own merits and uninfluenced by the observations made herein.

[SHARMILA U. DESHMUKH, J.]