

(2018) 01 BOM CK 0238
In the Bombay High Court
Case No : 5913 of 2017

Shri Ramdas Trimbak Sanap & Ors.

APPELLANT

Vs

Bajirao Trimbak Sanap

RESPONDENT

Date of Decision : 05-01-2018

Acts Referred:

[Constitution of India](#), [Article 227](#) -
Bombay Land Revenue Rules, 1972, Section 157

Citation : (2018) 01 BOM CK 0238

Hon'ble Judges : Dr. Shalini Phansalkar-Joshi

Bench : Division Bench

Advocate : Sugandh B. Deshmukh, Girish R. Agrawal

Judgement

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Deshmukh, learned counsel for the Petitioners, and Mr. Agrawal, learned counsel for the Respondent.

2. By this Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 2nd May 2017 passed by the District Judge-2, Niphad, District Nasik, thereby dismissing the Miscellaneous Civil Appeal No.17 of 2017 preferred by the Petitioners against the order dated 1st March 2017 passed by the 2nd Joint Civil Judge, Junior Division, Niphad, below "Exhibit-5" in Regular Civil Suit No.233 of 2016.

3. The Petitioners are the Original Defendants. The Respondent herein has filed a Suit against them for declaration that the suit properties, as mentioned in paragraph No.1(A) to 1(C) and paragraph No.3 of the Regular Civil Suit No.233 of 2016, are received by him in the partition and they are exclusively owned and possessed by him. Along with this relief, the Respondent is also claiming permanent injunction restraining the present Petitioners from causing obstruction to his possession in the suit properties.

4. The case of the Respondent is that, the suit properties were ancestral joint

family properties. By virtue of the partition effected on 4th March 2009, the Mutation Entry No.8204 was also made, thereby entering the name of the Respondent in the "7/12 Extract" of the suit properties. He is cultivating the same and he is in peaceful possession of the same; however, now the Petitioners have started causing obstruction to his possession and hence, he is constrained to file a Suit for declaration and injunction.

5. The Petitioners have resisted the Suit and the application for interim injunction by filing their written statement with a counter-claim contending, inter alia, that, there was no such partition, as alleged by the Respondent, on 4th March 2009. The said document was clearly executed only for the purpose of obtaining the Bank loan. Hence, there was no question of Respondent getting exclusive rights or possession over the suit land on the basis of the said document. Further it was submitted by the Petitioners that, a Partition Deed was effected between the Petitioners, Respondent and their father on 4th May 2009 and the suit property is given to the share of the Petitioners in the said partition. The Petitioners are in possession of the suit property and, therefore, the Respondent cannot be entitled to get any relief of declaration and injunction. His application for interim injunction, therefore, is also required to be rejected.

6. The learned Trial Court, after hearing the parties and on perusal of the documentary evidence, was pleased to hold that, prima facie, the Mutation Entry No.8204 and the "Document of Partition" dated 4th March 2009 were sufficient to show that the Respondent is in possession of the suit land. In addition thereto, it was also held that, the bills of the Grapes Garden cultivated in the suit land were produced by the Respondent to show his possession thereof and hence, the Trial Court granted the relief of interim injunction in favour of the Respondent.

7. This finding is confirmed by the Appellate Court while dismissing the Appeal preferred by the Petitioners.

8. While challenging this concurrent finding of the Trial Court and the Appellate Court, the submission of learned counsel for the Petitioners is that, both, the Trial Court and the Appellate Court have committed a factual error in holding that the document dated 4th March 2009 is a "Partition Deed", when the document clearly mentions that it was a "Document of Partition" of a temporary nature, in order to obtain the Bank loan. It is submitted that, the said document was clearly only between the two brothers and the other brothers and father are the consenting parties and hence, this Deed cannot be a Partition Deed. The real Partition Deed was effected on 4th May 2009 and on the basis thereof, it is the Petitioners to whom the suit land is allotted and they are in possession of the same. It is urged that, both, the Trial Court and the Appellate Court have given undue importance to the Mutation Entry No.8204; when on the basis of such mutation entry, no partition can be effected in the joint family properties. According to learned counsel for the Petitioners, the Trial Court has not even waited till the report of the Court Commissioner was received and the Appellate Court has not appreciated the Report of the Court Commissioner properly,

though it shows that, it is the Petitioners, who are in possession of the suit land. Thus, according to learned counsel for the Petitioners, though there is a concurrent finding of fact arrived at by the Trial Court and the Appellate Court, as it is perverse in the sense that it is not considering properly the documentary evidence on record, in the light of the legal position, the said finding of fact needs to be set aside, by allowing this Writ Petition.

9. Per contra, learned counsel for the Respondent has supported the impugned order of the Trial Court and confirmed by the Appellate Court by pointing out that, at the stage of deciding the application for interim injunction, the Court has to consider prima facie case only and the prima facie case definitely stands in favour of the Respondent. Because, apart from the "Document of Partition" dated 4th March 2009, there is also Mutation Entry No.8204 effected in the name of the Respondent, which shows that it is the Respondent, who is in possession of the suit land. The Report of the Court Commissioner cannot be considered for deciding as to who is in possession of the suit land, as the Court Commissioner cannot be appointed for the said purpose. Further it is submitted that, the Appellate Court has, even then, considered the Court Commissioner's Panchanama was made by the Court Commissioner, have not supported the case. They have stated that, actual Panchanama was not drawn in their presence and, thus, it is urged that, not only the Mutation Entry, but also having regard to the bills produced by the Respondent showing that he has cultivated the Grapes Garden in the suit land, both the Courts below have rightly held that the Respondent is in actual possession of the suit land and this Court, therefore, should be slow in interfering with the impugned order passed by the Trial Court and confirmed by the Appellate Court.

10. At this stage, learned counsel for the Respondent also points out that, the Petitioners have filed application for review of the order passed below "Exhibit-5" before the Trial Court, after receipt of the Court Commissioner's Report, and the said Review Application is rejected by the Trial Court on 16th November 2017.

11. Having considered the submissions advanced at bar by learned counsel for the Petitioners and learned counsel for the Respondent, at the outset itself, it has to be held that, in case of a discretionary relief like temporary injunction, when, both, the Trial Court and the Appellate Court have exercised the said discretion and the view taken by both the Courts below is a possible view of the matter, then, as held in the case of *Wander Ltd. & Anr. vs. Antox India P. Ltd.*, 1990 (supp.) SCC 727, this Court should restrain itself from interfering in the discretion exercised by the Trial Court, merely because this Court may arrive at a different view. For ready reference, paragraph No.14 of the said Judgment can be reproduced as follows :-

"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 re-assess the material and seek to reach a conclusion different from the one reached by the Court below, if the one reached by that 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."

12. Apart from that, here in the case, the documentary evidence, which is produced on record, definitely tilts the prima facie case in favour of the Respondent. In the first place, there is Mutation Entry No.8204, which is effected on the basis of the "Document of Partition" dated 4th March 2009, entering the name of the Respondent to the suit land. The said Mutation Entry was made not only on the application given by the Respondent alone, but by all the brothers and the father also. Since then, name of the Respondent alone is appearing in "7/12 Extract" of the suit land.

13. The Apex Court, in the case of Digambar Adhar Patil Vs. Devram Girdhar Patil (Dead) and Anr., AIR 1995 SC 1728, relied upon by learned counsel for the Respondent, has held that, "for deciding the factum of partition between two brothers, entries in the "Record of Rights" maintained in official course of business is a relevant piece of evidence and it is not necessary that the partition should be effected by registered Partition Deed only".

14. Further, the learned counsel for the Respondent has also relied upon the Judgment of this Court in the case of Shamrao Ganpat Chintamani Vs. Kakasaheb Laxman Gorde, 2008(2) ALL MR 118, wherein also, it was held that, "the necessary presumption, as required under Section 157 of the Land Revenue Code stands in favour of the mutations which are certified and the mutation entry is prima facie proof of possession over the suit land".

15. In the instant case, admittedly, such Mutation Entry, which is effected on the application given by all the four brothers and father, stands in the name of the Respondent to prove his prima facie possession over the suit land.

16. It may be true, that the "Document of Partition" dated 4th March 2009 shows that, it was of a temporary nature and effected for the purpose of obtaining the Bank loan; but then, the fact remains that, the said "Partition Deed" was acted upon and, accordingly, the mutation entry was also made and till the date, the said mutation entry is not challenged or cancelled.

17. As regards the "Document of Partition" dated 4th May 2009, on which the Petitioners are relying upon, there is nothing on record to show that this

"Partition Deed" is acted upon. It is also required to be proved properly. As observed by both the Courts below, it does not mention the earlier "Document of Partition" dated 4th March 2009. Petitioners have also produced on record one more document of "Memorandum of Partition" dated 13th July 2012. However, it is not signed by any of the parties. Thus, whatever the "Documents of Partition", which are produced on record by the Petitioners, are yet to be proved at the time of trial. But, at this prima facie stage, the "Document of Partition" dated 4th March 2009, the execution of which is not disputed by the Petitioners also, needs to be relied upon, as it is acted upon and the mutation entry is also made accordingly. One need not enter into the Report of the Court Commissioner to decide the factum of possession, as his Report cannot decide who is in possession of the suit property; especially, when the Panchas thereon are filing affidavits and counteraffidavits. Hence, the Appellate Court has rightly refused to place reliance on such Court Commissioner's Report.

18. For the present, it is sufficient that, the Mutation Entry No.8204 made on the basis of the "Document of Partition" dated 4th March 2009, to which the Petitioners were very much the parties, stands in the name of the Respondent, showing prima facie that, he is in possession of the said land. In addition thereto, there are also the bills of sugarcane, fertilizers and other documents produced by the Respondent to show his actual and physical possession over the suit land.

19. Therefore, the view taken by the Trial Court and confirmed by the Appellate Court being a possible view and being based on material produced before it, this Court cannot interfere in the said view. The Writ Petition, therefore, being without merits, stands dismissed.

20. On the request of learned counsel for the Petitioners, it is clarified that whatever observations made here-in-above are only for the purpose of deciding this Petition and the Trial Court is not to be influenced by them at the time of final hearing of the Suit.