

(2023) 01 BOM CK 0080
In the Bombay High Court
Case No : Writ Petition No. 10424 Of 2022

Udayraj Babaso Patil

APPELLANT

Vs

Pramod Babaso Patil

RESPONDENT

Date of Decision : 19-01-2023

Acts Referred:

Evidence Act, 1872 — Section 114
Specific Relief Act, 1963 — Section 38

Citation : (2023) 01 BOM CK 0080

Hon'ble Judges : Milind N. Jadhav, J

Bench : Single Bench

Advocate : Manoj A. Patil, Prajakt Arjunwadkar

Final Decision : Disposed Of

Judgement

Milind N. Jadhav, J

1. By the present Writ Petition, Petitioner has prayed for the following reliefs:-

"b. This Hon'ble Court be pleased to issue appropriate writ, order or direction and to quash and set aside the impugned judgment and order dt. 26/05/2022 passed by the Ld. District Judge-1, Jaysingpur in Misc. Civil Appeal No. 19 of 2021 and further be pleased to restore and confirm the order dt. 21/10/2021 passed by the Ld. Civil Judge Junior Division, Kurundwad below Exhibit 5 in Regular Civil Suit No. 95 of 2021.

d. This Hon'ble Court be pleased to issue appropriate writ, order and or direction and to allow/permit the Petitioner to carry out the construction activity of house property into the land of 0.08.46 R of Gat No. 2273 to the extent of his partitioned share [middle portion of suit gat property] situated at Abdul Lat, Tal.: Shirol, Dist.: Kolhapur."

2. Briefly stated the facts are set out hereunder:-

2.1. Petitioner and Respondent are brothers. Respondent is the original Plaintiff

who has filed Regular Civil Suit No.95 of 2021 in the Court of Civil Judge Junior Division, Kurundwad (for short "Trial Court") for seeking perpetual injunction against the Petitioner i.e. original Defendant No.1. For the sake of convenience parties shall be referred to as Plaintiff and Defendant.

2.2. Suit property ad-measures 0.25.38 R of Gat No.2273 situated at Abdullat, Tal.: Shirol, Dist.: Kolhapur. Suit property is one of the many properties belonging to late Babaso Annaso Patil i.e. father of the Plaintiff and Defendant.

2.3. After the demise of their father, Plaintiff and Defendant alongwith other legal heirs filed Regular Civil Suit No.5 of 2014 for partition and declaration. The said suit came to be compromised between all legal heirs namely Plaintiff, Defendant and another real brother called Sanjay (since deceased) and now represented by his legal heirs. Plaintiff does not have any dispute with Sanjay's branch.

According to the compromise decree dated 01.04.2014, Plaintiff, Defendant and Sanjay were respectively allocated 1/3rd share in all properties belonging to their father.

2.5. Though the suit property was part of several properties, it is contended that the same was not partitioned by metes and bounds in view of the bar under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short "the said Act"). However, according to the Plaintiff, suit property came to be equally divided between the three brothers and each of them became entitled to 0.08.46 R. It is contended that suit property was not demarcated by boundaries and was held jointly by all three brothers.

2.6. Plaintiff is aggrieved by the construction activity commenced on the suit property by Defendant No.1 and hence has opposed the said construction by filing Regular Civil Suit No.95 of 2021.

2.7. Exhibit-5 Application seeking temporary injunction was filed. It is contended that Defendant No.1, Defendant No.2 and Defendant No.4 filed their written statements and resisted the plaint. It was Defendants' contention that notional partition of the suit property was effected on 01.05.2013 by all brothers in the presence of panchas / elders of village and accordingly 0.08.46 R out of the suit property came to be allocated to each of the three brothers. It is an admitted position that each of the portions of the suit property coming to the share of each brother has frontage on Abdul Lat – Dattwadwas Road. That Plaintiff was given the northern portion, Defendant was given the middle portion and Sanjay represented by Defendant Nos.2 to 4 was allocated the southern portion out of the suit property. Each of the three brothers in the suit property have a frontage on the aforesaid road and hence since 01.05.2013 each of them continued enjoying their respective share in the suit property.

2.8. Plaintiff has contended that though the suit property was part of partition suit namely Regular Civil Suit No.5 of 2014, save and except the suit property, all other properties were physically partitioned and sub-divided into three equal

shares amongst the three brothers. According to Plaintiff, suit property was never partitioned and has always been held jointly by the three brothers.

2.9. Defendant has contended that on the northern portion allocated to the Plaintiff, Plaintiff has installed a readymade structure and is using the same for storage of agricultural equipment, fertilizers and all such material relating to agriculture. It is also contended that Plaintiff has installed a wire fencing around his portion of 0.08.46 R and has been exclusively enjoying his portion since 2013. So also, it is contended that Defendant No.1 and Sanjay's family are enjoying their respective shares in the suit property to the exclusion of the other brothers. It is contended that some portion of the suit property coming to the share of Defendant and Sanjay has been sublet to various persons and they are receiving rent from the tenants / occupants.

2.10. Defendant No.1 intended to construct the house on the portion of belonging to him and in his possession and custody. After seeking permission from the local Grampanchayat, Defendant No.1 has commenced construction of the house and the house structure is now fully constructed. Defendant No.1 also obtained a loan of Rs.24,00,000/- from Karmaveer Bhaurao Patil Zilla Nagri Sahakari Pathsanstha for construction of the house and executed a mortgage deed with the said financial institution to the extent of his portion i.e. 0.08.46 R and the proposed house constructed thereupon.

2.11. Being aggrieved, Plaintiff has filed Regular Civil Suit No.95 of 2021.

2.12. The learned Trial Court after hearing the parties and considering the documentary evidence placed before the Court rejected the Application seeking temporary injunction under Exhibit-5 by order dated 21.10.2021.

2.13. Being aggrieved, Plaintiff filed Misc. Civil Appeal No.19 of 2021 before the learned District Judge-1, Jaysingpur (for short "Appellate Court"). By order dated 26.05.2022, the learned Appellate Court set aside the order passed below Exhibit-5 and allowed the Appeal thereby granting temporary injunction and restraining the Defendant No.1 from carrying out construction of the structure / house until final adjudication of Regular Civil Suit No.95 of 2021.

2.14. Hence, the present Writ Petition.

3. Mr. Patil, learned Advocate appearing for Petitioner (Defendant No.1) has submitted that, admittedly the structure constructed upon by Defendant has already been fully constructed and it is only then that the present suit has been filed. Petitioner has relied upon the current photographs of the structure to show its status which is not in dispute. He has made the following submissions:-

(i) that the learned Appellate Court has erroneously disturbed the well reasoned findings given by the learned Trial Court while dismissing the Application seeking temporary injunction below Exhibit-5 in the facts and circumstances of the present case;

(ii) that the order passed by the learned Trial Court rejecting temporary injunction was passed after considering the prima facie case, balance of convenience and the irreparable loss that would be caused to Defendant No.1 and hence the same deserves to be sustained;

(iii) that admittedly the suit property came to be equally divided amongst three brothers on 01.05.2013 though not with metes and bounds to be reflected in the revenue record, but the share allocated to each of the three brothers does stand reflected in the revenue record i.e. 7/12 extract and each of the parties have enjoyed their respective share to the exclusion of the others thereafter;

(iv) that in so far as the share of the Plaintiff is concerned, it is an admitted position that Plaintiff has put up a house structure on the portion occupied by him and has been using the said structure since 2019;

(v) that similarly in so far as deceased Sanjay's portion is concerned, the same has several structures constructed thereon namely shed, garage, rooms and godown and the Plaintiff has never objected to the same;

(vi) that Defendant No.1 desired to construct a house on the portion occupied by him and has taken appropriate permission from the local Grampanchayat and has already completed construction of the house;

(vii) that objection raised by Plaintiff that the entire suit property is jointly held by the three brothers is erroneous in the facts which are narrated above and hence the order passed by the learned Appellate Court deserves to be set aside;

(viii) that each of the three segments / portions of the suit property enjoyed by the three brothers have a separate access which each of them have been enjoying since 2013;

(ix) that Defendant No.1 has placed material evidence in the form of the Affidavit of Shri. Kallappa Sidram Mhaisale, one of the panchas to corroborate the fact of oral partition and division of shares in the suit property and enjoyment and occupation of the same thereafter by the three brothers;

(x) that this Affidavit filed by the concerned witness has been prima facie considered by the learned Trial Court as a material piece of evidence to corroborate the fact that division of the suit property into three shares had indeed taken place in 2013;

(xi) that the division having been taken place is also duly reflected in the revenue record i.e. 7/12 extract which is placed on record at page No.85 to the Petition;

(xii) that it is an admitted position that the segment / portion occupied and in the possession and custody of deceased Sanjay's family has been on sublet to Sandeep Admane, Sagar Bodge and Deepak Chougule. Defendant No.1 has placed the Affidavit in evidence of the legal heirs of deceased Sanjay before the learned Trial Court which state that the said land has been used by them for

carrying out their business activities; The Affidavits of the three tenants on Sanjay's portion have also been filed before the learned Trial Court and they have also been considered. That Defendant No.1 does not have any grievance about these activities and the same has been conveniently ignored by the learned Appellate Court;

(xiii) that Defendant No.1 has obtained permission from the local Grampanchayat for carrying out the construction of house on his portion;

(xiv) that Defendant No.1 has also placed on record a true copy of the mortgage deed at Exhibit-24/2 which corroborates the Defendant's case since it clearly mentions that he has availed loan of Rs.24,00,000/-from Karmaveer Bhaurao Patil Zilla Nagri Sahakari Pathsanstha and executed a registered mortgage deed with the said institution;

(xv) that perusal of the mortgage deed would clearly establish that Defendant No.1 is in separate enjoyment of the share allocated to him and the said construction has been carried out by him on his portion out of the suit property;

(xvi) that it has been admitted by the Plaintiff in another suit being SCS No.16 of 2014 filed between the same parties that pursuant to the filing of Regular Civil Suit No.5 of 2014, a settlement and compromise was effected between the parties with the intervention of panchas and after due deliberation some of the properties came to be compromised and divided in writing whereas some of the properties came to be compromised and divided orally between the parties; that in view of these averments of the Plaintiff in a subsequent suit, it is now not open to him to contend that the suit property has been enjoyed jointly by all three brothers all throughout;

(xvii) that it is wrongly mentioned in the plaint that the suit property is partly barren land, part of it is cultivated and the remaining part is lying vacant. These averments are the contrary to the present status of the suit property;

(xviii) that Affidavit filed by Mr. Kallappa Sidram Mhaisale at page No.171 of the Writ Petition corroborates the fact that compromise and settlement was effected between the three brothers with respect to the suit property and the same has been prima facie considered by the learned Trial Court;

(xix) that in Plaintiff's Affidavit dated 10.08.2021 filed before the learned Trial Court at page No.189 of the Writ Petition; Plaintiff has admitted to have put up a house structure on his portion out of the suit property.

4. In view of the above submissions, he has submitted that the order passed by the Appellate Court deserves to be quashed and set aside and the reasoned order given by the learned Trial Court deserves to be upheld.

5. PER-CONTRA, Mr. Arjunwadkar, learned Advocate appearing for the Respondent (Original Plaintiff) has vehemently submitted that Plaintiff shall proceed on the basis of pleadings which are on record. He submitted that the

order passed by the learned Trial Court is solely on the basis of the Affidavit of Mr. Kallappa Sidram Mhaisale and nothing more. That the said Affidavit of the witness cannot be relied upon by the learned Trial Court and is required to be tested in evidence and hence in that view of the matter the order passed by the learned Appellate Court is a correct order. That admittedly 9 out of the 10 properties came to be physically divided between all three brothers save and except the suit property.

5.1. He submitted that unless and until the truth of the contents of the Affidavit of the pancha witness relied upon by the learned Trial Court is tested in evidence, the same cannot be relied upon. He submitted that save and except this contention there is no other material evidence placed on record by the Defendant which deserves consideration. He has elaborated and deliberated the averments made by Defendant No.1 in Regular Civil Suit No.5 of 2014 and submitted that the suit property has not been divided by metes and bound and partitioned between the parties. Hence Defendant cannot be entitled to raise any construction of the house on the suit property. He has comprehensively denied the fact that the suit property is held separately and independently by the three brothers and submitted that the same is in fact held jointly. In support of this proposition, he has referred to and relied upon the 7/12 extract wherein the word 'Samuhik' in respect of the suit property is mentioned. He has further submitted that Defendant has carried out construction of his house without obtaining the requisite permission from the local Grampanchayat. On being questioned by the Court, as to whether he had raised similar objections to the structures standing on the portion of the suit property allocated to his deceased brother Sanjay and his legal heirs, he has no answers.

5.2. In support of his propositions, Mr. Arjunwadkar has referred to and relied upon the following five judgments:-

(i) Vidhyadhar Vs. Manikrao and Anr. (1999) 3 SCC 573;

(ii) Iswar Bhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and Anr. (1999) 3 SCC 547;

(iii) Rasiklal Manikchand Dhariwal and Anr. Vs. M.S.S. Food Products (2012) 2 SCC 196;

(iv) Girdharbhai Becharbhai Patel and Ors. Vs. Gordhanbhai Parshottamdas and Ors. AIR 1981 Gujarat 93, and

(v) I. Gouri and Ors. Vs. Dr. C.H. Ibrahim AIR 1980 Kerala 94.

5.3. He has referred to the decision in the case of Vidhyadhar (first supra) and contended that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise under the provisions of Section 114 of the Evidence Act, 1872, that the case set up by him is not correct. He submitted that on the basis of this principal the reliance of the learned Trial Court on the

Affidavit of Mr. Mhaisale without he being subjected to cross-examination cannot be taken into consideration for believing the fact that division of the suit property had indeed taken place between the three brothers.

5.4. He has referred to the decisions in the case of Iswar Bhai C. Patel & Bachu Bhai (second supra) and Rasiklal Manikchand Dhariwal (third supra) and contended that an adverse presumption must be drawn against the party who does not produce himself for cross-examination and refuses to enter the witness box in order to refute the allegations made against him or to support his pleadings in his written statement. There is no doubt that this proposition is correct, but the facts of the present case are different and the issue for consideration is at an interim stage. In the present case, the learned Trial Court has weighed the contents of the four Affidavits filed before itself and on the touchstone of the principles governing grant of temporary injunction, passed the order.

5.5. He has next referred to the decisions in the case of Girdharbhai (fourth supra) and I. Gouri (fifth supra) which have also been referred to by the learned Appellate Court while passing the impugned order and reversing the judgment and order passed below Exhibit-5 of the learned Trial Court and contended that if there are several owners in possession of an undivided property then none of them could have exclusive right to appropriate to his exclusive use any portion of the property and it so used would effect a compulsory partition in his own favour according to his choice. He therefore submitted that considering the facts of this case, this Court will have to see the injury caused to the Plaintiff which would be of a recurring character in the event if the Trial Court's order is upheld and the Defendant is allowed to continue use of the portion of the suit property and further allowed to construct his house thereon. In view of the above submissions and legal propositions, he has urged the Court to dismiss the Writ Petition.

6. I have heard Mr. Patil, learned Advocate appearing for the Petitioner and Mr. Arjunwadkar, learned Advocate appearing for Respondent and with their able assistance perused the record and pleadings of the case. Submissions made have received due consideration of the Court.

7. In the present case, it is seen that Regular Civil Suit No.95 of 2021 has been filed by Plaintiff (Respondent herein) against the Defendant (Petitioner herein) and the legal heirs of deceased Sanjay (brother) under Section 38 of the Specific Relief Act, 1963 for seeking a perpetual injunction against all Defendants from carrying out any permanent construction on the suit property. It is averred in paragraph No.2 that the suit property though required to be divided amongst the three brothers, has not been partitioned by metes and bounds and in some portion of the suit property Kharif crops are grown whereas some portion of the suit property is barren land. Further averment in paragraph No.2 states that the entire suit property is jointly held without determining the boundaries in respect of the share of the three brothers. Application under Exhibit-5 has been filed reiterating the contents of the plaint by the Plaintiff. To the said Application below

Exhibit-5 a common reply dated 20.07.2021 is filed by Defendant Nos.1, 2 and 4 therein, inter alia, stating that the suit land has been notionally divided between the three brothers and each of them is holding an area of 0.08.46 R independent of the other two brothers and to the exclusion of the other two brothers. In paragraph No.11 of the Affidavit-in-reply the boundaries as agreed and decided by them have also been mentioned. Defendants have contended before the learned Trial Court that Plaintiff has since 2019 placed a house structure on the portion allocated to him and is using the same for storage of fertilizers and agricultural equipment. That apart, it is also stated that some portion of the suit property allocated and used by Defendant and Sanjay's legal heirs was jointly given to a garage who has erected a structure and was operating from the said property and paying rent to them. It is further contended that on Sanjay's property there are brick and masonry structures which are used as godown, shed for parking of tractor, four brick and masonry rooms which are in fact sublet to third parties.

8. Record indicates that the tenants have filed substantive Affidavits which is part on record at page Nos.175 to 194. Record clearly indicates that Plaintiff has raised no objection whatsoever to the use of the suit property by himself as also by Sanjay's legal heirs. It is only now in 2021 when the Defendant started construction of his house and after the construction of the entire structure is now completed, Plaintiff has filed the suit before the learned Trial Court seeking permanent injunction. It is pertinent to note that the case of Plaintiff before the learned Trial Court that the suit property is joint property and it produces Kharif crop partly and some part is barren land has not been accepted by the learned Trial Court. In fact, record indicates that the three portions of the suit property which have come to the entitlement of the three brothers are all having frontages on the main road and are used by the three brothers to the exclusion of the other two brothers since 2013. It is further an admitted position that Plaintiff has put up a wire fencing around the portion allocated to him i.e. his share, thus himself demarcating the portion of the suit property unto himself for his exclusive use. In the background of the aforesaid facts, it cannot be contended by Plaintiff that the suit property is still undivided suit property. The contention of Plaintiff is false on the face of record. That apart, it is seen that Plaintiff has not raised any objection with respect to the structures which have been in long use since 2014 on Sanjay's portion of the suit property and have never raised any objection whatsoever for the past seven years.

9. The learned Trial Court while passing the judgment and order dated 21.10.2021 has considered the aforementioned facts and in paragraph Nos.11 and 12 of the said judgment returned a positive finding. One of the contentions raised before the learned Trial Court is that the Defendant was carrying on construction in the absence of the permission from the Grampanchayat. The said permission is in fact produced on record and hence this objection of the Plaintiff does not survive. The learned Trial Court has considered the permission granted by the local Grampanchayat for construction to Defendant below Exhibit-24/1.

The next objection raised by Plaintiff was in respect to the description of the suit property in the revenue record and it was contented that though in the revenue record there are three portions of the suit property standing against the name of each brother to the extent of 0.08.46 R area, it is stated in the revenue record that the entire area is "Samuhik" i.e joint property. The learned Trial Court has carefully analysed the 7/12 extract i.e. revenue record and returned the finding that all three brothers are in fact holding 0.08.46 R area out of Gat No.2273 i.e. the suit property and it is also confirmed that there is no joint vahivat / right of way in respect of the suit property. The learned Trial Court has also perused the record and pointed out to the boundaries of the three portions of the three areas held by the three brothers and that since 01.05.2013, they have been using the said portion exclusively. The learned Trial Court while considering the Application below Exhibit-5 has prima facie after reading the Affidavit dated 01.03.2013 come to the conclusion that the pancha who has assisted the parties has himself stated on oath that the suit property was notionally sub-divided between the three brothers by effecting a compromise / settlement in the presence of panchas and he himself acted as a pancha during the said division. That apart, the learned Trial Court has also relied upon the Affidavits filed below Exhibits-20, 21, and 22 by the tenants and occupants of the structures on Sanjay's portion.

10. Perusal of the Affidavits which are part of record reveal that the deponents who are tenants of Sanjay's branch are paying rent to them for the past several years. It is pertinent to note that the learned Trial Court has in paragraph No.13 noted that though the suit property has been notionally divided and is used by the three brothers, the same has not been divided and partitioned in view of the express bar of the provisions of the Consolidation and Fragmentation Act.

11. In view of the above facts, the learned Trial Court has in paragraph No.14 returned a finding that the construction carried out by Defendant is in fact on the portion allocated to him which is the portion in between Plaintiff's and Sanjay's share in the suit property and it does not transgress the share / portion of the suit property which is held by the Plaintiff. After considering the aforesaid facts in details and pleadings of the parties, the learned Trial Court has rejected the Application under Exhibit-5.

12. As against this rejection, the learned Appellate Court in Misc. Civil Appeal No.19 of 2021 filed by the Plaintiff has reversed the order of the learned Trial Court. The learned Appellate Court has set aside the order of the learned Trial Court on the ground that the suit property has not been sub-divided and partitioned between the parties in the partition suit filed by the parties. It needs to be noted that admittedly save and except the suit property and all other 9 properties between the three brothers were partitioned equally amongst them. The reason for not physically dividing and partitioning the suit property has evidently come on record in view of the express bar of the said Act and as such physical division of the suit property / shares between the three brothers has not been done. This is one important aspect of the matter. The learned Appellate

Court while considering this aspect has completely ignored the status of the suit property as used and understood by the three brothers in the present case. From the pleadings on record, though a bare denial is given by the Plaintiff that physical partition and division of the suit property has not taken place in the presence of panchas, the same cannot be held to be the correct position due to the following reasons:-

(i) In a parallel suit namely SCC No.16 of 2014 filed by the Plaintiff for partition, in paragraph No.2 of the suit plaint he has categorically admitted to the fact that on 28.02.2014 there was a compromise and settlement agreed between the parties by the intervention of panchas and by virtue of the said compromise, certain properties were divided by written agreement whereas certain properties were divided by oral agreement between the parties;

(ii) that in view of the bar of the said Act, admittedly in respect of the suit property physical division / partition could not be effected and hence it was decided with the intervention of panchas that all three brothers shall be notionally entitled to the use of 1/3rd area of the suit property to the exclusion of the others and it is seen that all parties have been using the same for themselves;

(iii) that averments in the Affidavit of evidence filed by the Plaintiff before the learned Trial Court and more specifically in paragraph No.3 clearly suggests that the Plaintiff has used the portion of the suit property allocated to him for putting up a structure by Nilaya Technology Home as a pilot project and role model which was inaugurated by the local MLA and Collector and in fact is in use of the said structure;

(iii) in his Affidavit Plaintiff has submitted that permission has not been given by him to any person to put up the construction / structure on the portion allocated to him and some third party had taken advantage of the same and built the same and the said structure has been standing thereon and is used by him for his benefit. In so far as the issue of wire fencing is concerned, it is an admitted position that Plaintiff has put up the wire fencing around the portion used by him and he is in use the structure standing thereon and uses it for storage of agricultural equipments and fertilizers.

13. The learned Appellate Court while considering the aforesaid situation has returned a completely erroneous findings in paragraph No.21 wherein it is stated that since the partition of the suit property has not been carried out by metes and bounds and the boundaries have not been determined, prima facie, it can be ascertained that the right of the parties to use the suit property can only be determined at the stage of final hearing of the suit and any attempt made by the Defendant in constructing on the suit property would change the nature of the suit property and on this ground alone has set aside the reasoned order dated 26.05.2022 passed below Exhibit-5.

14. That apart, it also reiterated that in the pending parallel Regular Civil Suit

No.5 of 2014 filed by the three brothers jointly, in so far as the suit property is concerned, it is contended by all three brothers that they have an area admeasuring 0.08.46 R out of Gat No.2273 which has come to their share out of the suit property.

15. In view of the aforesaid discussion and findings and the order dated 21.10.2021 passed by the learned Trial Court, the impugned order dated 26.05.2022 in the present Writ Petition is not sustainable and deserves to be interfered with. The said order is quashed and set aside and the reasoned order dated 21.10.2021 passed below Exhibit-5 is sustained.

16. However, it is clarified that since order below Exhibit-5 has been passed on the basis of prima facie consideration by the learned Trial Court, it is directed that interest of justice would be sub-served, if while allowing the Defendant to carry out, complete the construction and use of the structure, the same shall be made subject to the ultimate decision of the pending suit before the learned Trial Court.

The Defendant cannot be directed to demolish the construction at this stage nor it would be proper to stop the further construction of the house which is almost complete. It is directed that the learned Trial Court shall dispose of the suit as expeditiously as possible in accordance with law.

17. With the above observations and directions, Writ Petition stands allowed in terms of prayer clauses 'b' and 'd'.

18. Writ Petition is disposed.