

IN THE BOMBAY CITY CIVIL COURT AT BOMBAY

ORDER ON NOTICE OF MOTION NO.3173 OF 2012

IN

SUIT NO.4849 OF 2007

(HIGH COURT SUIT NO.1055 OF 2007)

Mahesh Vithaldas Ajugia Plaintiff

versus

Taramati Vithaldas Ajugia and others ... Defendants

And

Dinesh Agarwal and another ... Respondents

(Before : **I.M.BOHARI**)

(C.R.NO.13)

DATE : **07th APRIL, 2015.**

Advocate Mr.PK. Pandit for the plaintiff.

Mr.N.M. Shah appearing for the defendant Nos.1 to 3.

Advocate Mr.PD. Gandhi for defendant No.4.

Advocate Mr. Bhavik Mane for the respondents.

ORDER

1. I have heard advocate Mr.PK. Pandit for the plaintiff and advocate Mr. Bhavik Mane for the respondents against whom present notice of motion for contempt etc. reliefs is filed. Advocate Mr.PD. Gandhi appearing for defendant No.4 has filed his written arguments at Ex.4. I have gone through it. Advocate Mr.N.M. Shah

appearing for the defendant Nos.1 to 3 has adopted the written arguments filed at Ex.4.

2. The suit premises admeasuring about 5635.70 sq.mtr came to the shares of the plaintiff and defendant Nos.1 to 4 equally through their father and grandfather. Thus the plaintiff and defendant Nos.1 to 4 have $1/5^{\text{th}}$ undivided share each. The Suit property is a open land and it is a plot of land bearing survey No. 428, Hissa No.3 at Malad (W), Borivali District, Mumbai. The suit dated 22/03/2007 is filed for partition and separate possession of $1/5^{\text{th}}$ share. Admittedly on 10/09/2012 defendant Nos.1 to 4 sold their $1/5^{\text{th}}$ each undivided share i.e. total 80% share in the suit property to the respondents. The defendant Nos.1 to 4 did so in view of His Lordship Shri A.M. Khanwilkar, Justice's (as then he was) interim injunction order wherein the status-quo order passed earlier was modified to the extent that the defendant Nos.1 to 4 were granted liberty to create third party rights, title, interest to the extent of their shares. It was further ordered that status-quo as

to the possession in respect of the suit property as on 19/04/2007 to be maintained. It was further clarified that in the event of transfer of share of defendant Nos.1 to 4 the plaintiff's possession being joint possession shall not be interfered. Said interim order was confirmed on 02/12/2009 by His Lordship Shri S.J. Vajifdar, Justice, (as then he was).

3. In the above background the plaintiff has contended that when on 05/10/2012 he visited the suit property he found that iron sheet gate was installed at the entrance with a lock and two security guards were deployed at the gate. The said security guards were appointed by the respondents who prevented the plaintiff from entering and inspecting the suit property. Therefore on 08/10/2012, 09/12/2012 the plaintiff lodged police complaints with Malad police station. It is contended that respondents tried to establish their exclusive possession over the suit property and thus the plaintiff is entitled to interim prohibitory injunction, for appointment of Court Receiver and for contempt action against the

defendants/respondents. Elaborate affidavit, photographs of the suit property, copies of police complaints are filed in support of the notice of motion. The plaintiff has also filed his additional affidavit in which it is contended that share on the suit property was also found demolished by the defendant/respondents. As against this defendant Nos.2, 4 and respondent have filed their affidavits in reply and admitted the plaintiff's 1/5th undivided share in the suit property. They have denied all other adverse allegations in toto.

4. The points which arise for my determination are as follows :

<i>POINTS</i>	<i>FINDINGS</i>
1. Whether the defendants/respondents committed breach of the interim injunction order?	- No
2. Whether the Court Receiver under Order 40 Rule 1 of CPC needs to be appointed for the suit property in question?	- No

POINTS

FINDINGS

- | | | |
|----|---|-----|
| 3. | Whether the defendant/respondents need to be directed not to disturb the plaintiff's joint possession over the suit property? | Yes |
|----|---|-----|

REASONS

5. **AS TO POINT NO.1** : It is contended that the respondents are not parties to the suit and hence notice of motion against them is not tenable. Advocate Mr.P.K. Pandit appearing for the plaintiff has submitted that as held in **K.L. Virmani, versus, IIIrd Additional Dist. Judge and others, reported in AIR 1992 Allahabad 326 and Uttam Hundrajmal Awatramani, versus, Jayant Dattatraya Bhalerao, reported in The Bombay Law Reporter, 522**, proceeding under Order 39 Rule 2-A can be filed against the defendant even if they were not personally present at the time of disobedience. Likewise such a proceeding can be filed also against a party, a person who is not party to the suit. Needless

to say that it is always the choice of the plaintiff to whom make party to the suit. If we consider nature of the suit for partition and separate possession of the suit properties it is needles to say that the respondents may not be necessary parties. On the other hand, if respondents apprehend that their bonafide rights would be prejudiced if they are not made parties to the suit, they can file application to that effect. It is worth to note that there is no dispute about 1/5th each undivided share of the plaintiff and defendants in the suit property in question and as such the plaintiff also cannot protest against transfer of total 80% share in the suit property by defendant Nos.1 to 4 to the respondents. Therefore only it is not necessary to go through the recitals of the deed executed between the defendants and respondents in respect of total 80% share or only 3,000 sq.ft. shed in the suit property. Even otherwise that dispute deserves a meritorious decision. Suffice to say that present notice of motion for the contempt action, injunction order if any is tenable.

6. Plaintiff's case is that he saw the iron gate installed at the entrance point of the suit property and also two security guards appointed by the respondents. The question is whether the erection of the shed in the nature of protecting the suit property can be said to have deprived the plaintiff of his admitted 20% undivided share in the suit property. The suit property is in the suburb like Malad and value of land of every inch in a city like Mumbai is well known. Admittedly it is not the case of the plaintiff that the defendants, respondents are intending to carry out some construction of temporary or permanent nature over the suit property. In the case of **Delhi Development Authority, versus, Bennete Coleman & Co. Ltd., reported in Contempt Civil Petition No.167/93, decided on 18/01/95**, which is relied upon by the respondents' advocate Mr.Bhavik Mane, a wall erected around the disputed property was found to have been erected for protection from encroachment and as such it was held that there was no willful disobedience. Resultantly notice of contempt was discharged.

7. Facts of the present case are also similar. Advocate Mr.Bhavik Mane appearing for the respondents has submitted that the agreement, possession receipt police statements etc. documents relied upon by the plaintiff cannot be read in isolation. According to me all those documents do confirm about the defendants' total 80% undivided share and the plaintiff's 20% undivided share in the suit property. Till the partition takes effect by meets and bound, there cannot be any severance of the suit property. Suffice to say that point No.1 merits negative finding. Hence I hold it accordingly.

8. Before parting it is to be noted that advocate Mr.P.K. Pandit has placed his reliance on following citations:

Darshan Singh and others, versus, Gujjar Singh and others, reported in AIR 2002 Supreme Court 606, on the point that even if one co-sharer is in exclusive possession of the joint

property it is always his deemed possession over such a joint property also on behalf of other co-sharers unless there is clear ouster of other co-sharers by denying title of other co-sharers. In the present case defendants and respondents have neither ousted the plaintiff neither denied his joint possession and undivided share over the suit property.

Samee Khan, versus, Bindu Khan, reported in AIR 1998 Supreme Court 2765, on the point of power of Court under Order 39 Rule 2-A. It was held by Honourable Apex Court that the Court may either detain the disobeying party or attach his property or take both the steps. In the said case small space of land was used as a means of access (Galli). In spite of temporary injunction which was made absolute, the defendant had put up a brick wall in the disputed space in utter defiance of the injunction order. Facts of the present case are distinguishable.

9. **AS TO POINT NO.2** : Court Receiver can be appointed under Order 40 Rule 1 of CPC where it appears to be just and

convenient to do so. To buttress the appointment of Court Receiver the plaintiff's advocate Mr.PK. Pandit has placed his reliance on **Sudeshkumar Alias Santoshkumar Roshanlala Agarwal of M/s Rockline Construction Co., versus, Bombay Alloy Steel Industries Pvt. Ltd., reported in LAWS (BOM)-2000-8-70.** Going through this citation it appears that defendants therein had violated the injunction order by entering into the leave and license agreement for 60 months. It was further apprehended that defendants might repeat their action also in respect of other properties. With due respect mere erection of a tin shed or even a demolition thereof cannot be said to be detrimental to the plaintiff's right. At the cost of repetition I would like to say that the suit property which is a open and big land does need protection from trespassers. Not only the defendants, respondents, the plaintiff himself also can join erection of a tin shed/fencing/compound wall around the suit property so as to see that it stands unencroached. defendant/respondents are having 80% undivided share in the suit property. Their chunk is four times

bigger than that of the plaintiff. The plaintiff cannot be allowed to frustrate their rights by asking for the Court Commissioner to take possession of the suit property. Hence I negate point No.2.

10. **AS TO POINT NO.3** : Admittedly the plaintiff has filed this suit for partition and separate possession in respect of number of properties. Present notice of motion revolves around the suit property. Possibility cannot be ruled out that respondents having deployed security guards and erected tin shed over the suit property the plaintiff's entrance must have been denied by the respondents or on their behalf by their security guards. Once the plaintiff's undivided share in the suit property is admitted and reiterated in the agreement, written statement before the police the plaintiff cannot be restrained in any way from going to the suit property till his 20% share is demarcated. Such interim injunction restraining the defendant/respondents from disturbing the plaintiff's joint possession over the suit property needs to be granted. Resultantly I answer point No.3 in affirmative.

11. Before proceeding further I must add that considering wafer thin dispute between the plaintiff and respondents I had asked the rival advocates to call the respondents before the Court so that a talk can take place between the respondents and the plaintiff. Cost of construction/development of property is escalating day in and day out. Either the plaintiff can sell his 20% undivided share in the suit property to the respondents or can get his 20% share demarcated from the rest of the 80% share of the defendants/respondents. Advocate Mr.P.K. Pandit so also advocate Mr.Bhavik Mane accordingly made the plaintiff and the respondents to have some talk in that regard and I am happy to note that they have orally agreed to appoint their individual architects for the modalities. I hope and pray wisdom prevails and the dispute is resolved amicably. It be as it is. For the aforesaid reasons I pass following order:

ORDER

1. Notice of Motion No.3173/12 in Suit No.4849/07 is partly allowed.

2. Prayers for contempt action and for appointment of Court Receiver are rejected.
3. Notice of motion is allowed only in terms of prayer clauses (b) & (c) and the defendants/respondents are restrained from disturbing the plaintiff's joint possession over the suit property.
4. Costs in cause.

Date : 07/04/2015

(I.M.Bohari)
Judge,
City Civil Court,
Greater Mumbai.

Dictated on : 07/04/2015.
Transcribed on : 08/04/2015.
Signed on :