



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9795 OF 2023

Ganpat Babu Khatate

..... Petitioner

Vs.

Dhondur Vithu Khatate and Ors.

..... Respondents

Mr. Sumit Kothari for the Petitioner.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 17 AUGUST 2023.

P. C.

1. Heard.

2. The challenge in the petition is to the order dated 29/4/2023 rejecting the petitioner's application seeking stay of the judgment and decree dated 13/4/2022 passed in Regular Civil Suit No.60/2010.

3. Regular Civil Suit No. 60/2010 was instituted by the respondent-plaintiff seeking an order of perpetual injunction restraining the petitioners from interfering with the possession of the respondent over the suit property. The case of the respondent-plaintiff was that the suit property was in possession of the plaintiff

since last 7 years as tenant of the suit property and that he is the owner of the suit property. It was further contended that on the suit property there is house bearing No.104 and the name of the respondent was mutated in the revenue record till 1991. It is pleaded that however in the year 1998-1999 the revenue authority has illegally removed the name of the plaintiff from the 7/12 extract as against which an application has been filed and the same is pending. It is pleaded that the cause of action has arisen on 22/10/2010 when the petitioners attempted to dispossess the respondent from the suit property.

4. Written statement came to be filed by the petitioners in which it was admitted that three Gunthas land was given to the respondent-plaintiff. It is contended that an application for declaration of tenancy was filed by the respondent-plaintiff which was withdrawn voluntarily on 22/4/2010 and as such the respondent is now estopped from claiming tenancy. The case of the petitioner is that the respondent is a gratuitous licensee in respect of 3 Gunthas of land and nothing further. The evidence came to be led and by judgment and decree dated 13/4/2022, the suit was decreed and the petitioners were restrained from obstructing the

possession of the plaintiff over the suit property. The trial Court on consideration of the evidence held that the respondent is in possession of the suit property to the extent of 15 gunthas which is proved by documentary evidence on record and as such respondent has right to file a suit for injunction. This was in respect of the submission that a suit simplicitor for injunction would not lie.

5. The trial Court upon consideration of the documentary evidence viz., 7/12 extract of Gut No.1146 from 1978-1979 to 1992-1993 held that the same reveals the name of father of defendant No.1 as owner and possessor, however column of Form 12 entry of "Ghar Parde" to the extent of 15 gunthas appears in name of plaintiff. The trial Court considered the panchyadi of Circle Officer which was not challenged in which there is mention of "Ghar Parde" to the extent of 15 gunthas in Gat No.1146 and held that the plaintiff is in possession of 15 gunthas. As against the judgment and decree passed by trial Court on 13/4/2022 appeal came to be filed by the petitioner in which an application was moved for stay of the decree from the judgment and decree. The appellate Court has rejected the said application giving rise to the present petition.

6. Learned counsel appearing for the petitioner submits that in the written statement it was the specific case of the petitioner that the suit property is not properly described in the plaint. He would further contend that the admitted position is that only 3 gunthas of land was given as gratuitous licensee and the claim of the respondent in respect of 15 gunthas of land has not been established. He would further contend that the bar under section 85 of the Maharashtra Tenancy and Agricultural Lands Act would apply in the present case. He has taken this Court to the evidence adduced during the trial and would contend that there is admission that in the year 1987 the respondent had made an application for including his name as co-owner, which came to be rejected, as against which there is no appeal filed. He would further urge that the cross examination shows that some part of the suit property has been handed over to the Zilla Parishad, however, Zilla Parishad is not made a necessary party. He has further pointed out the admission of the plaintiff as regards description of the property and would contend that the admission made in the evidence is contrary to the description which has been given in the plaint. He would further submit that there is clear admission by the

respondent that consideration was paid for 3 gunthas of land. He would submit that if stay is not granted the same would result in the respondent taking possession of 15 gunthas of land whereas claim is required to be restricted to only 3 gunthas. In support of his submission he relied upon the decision of this Court in the case of *Godawaribai Purushottam Bawaskar v. Sitaram Bhagwan Paithane and Ors. 2020 (3) Mh. L.J. 102.*

7. Considered the submissions and perused the papers with the assistance of learned counsel for the petitioners.

8. The only issue which is required to be considered in the present case is whether the petitioner is entitled to stay of judgment and decree of the trial Court. The provisions of Order 41 Rule 5 of CPC provides for stay of execution of decree upon sufficient cause shown to the appellate Court. The suit has been instituted simplicitor for injunction restraining the defendant from interfering with the peaceful possession of the respondent over the suit property which has been described as land ad-measuring 15 gunthas and the house constructed thereon. The trial Court on the basis of documentary evidence has come to a finding that the

respondent is in possession of 15 gunthas of land. The suit has been filed in the year 2010 and no material has been produced on record to demonstrate that at any point of time there was any proceedings instituted by the petitioner as regards encroachment by the respondent over the land bearing 15 gunthas. There is admission by the petitioner that 3 gunthas land has been handed over to the respondent albeit as gratuitous licensee. However, it cannot be inferred that the possession was only in respect of 3 gunthas as there is categorical finding of plaintiff being in possession of 15 gunthas on the basis of documentary evidence by the trial Court which is since the year 2010 and the appeal has been filed against the judgment and decree passed in the year 2022. At this stage what is required to be considered is that whether the position which existed since the year 2010 is required to be disturbed by granting stay to the injunction. The appellate Court while considering the prayer for stay has considered the material on record in the form of receipts of House No. 104 on 3 gunthas of land and order of Tahsildar that the respondent is in possession of 15 R land in Survey No.1147 which shows name of mother of the petitioner. The appellate Court has rightly considered that the

submission as regards incorrect boundaries will be a matter of trial. The appellate Court has exercised discretion which is vested in it under the provisions of Order 41 Rule 5 of CPC and has rejected the application for stay on the ground that there is no sufficient reason shown by the appellant to stay the execution of the decree. The submission made by the learned counsel for the petitioner before this Court is in respect of merits of the case which will be decided at the time of hearing. Learned counsel for the petitioner has not been able to show any perversity in the discretion which has been exercised by the appellate Court while rejecting the application for stay. The power under Article 227 of the Constitution is not to be exercised to correct mere errors of law and fact unless it is shown that manifest injustice has been caused to the party seeking to challenge the order of appellate Court. In the present case there is nothing demonstrated to show that there has been perversity of such a nature so as to cause manifest injustice. On the other hand considering that the respondent is in possession of the property since the year 2010 and as the decree is in his favour, there is no reason to stay the said judgment and decree as the same may in fact lead to further litigation. If the decree is stayed

then attempt may be made by petitioner to dispossess the respondent from suit property. The decision which has been relied upon by the learned counsel for the petitioner is the decision rendered in second appeal. The decision is on the merits of the case in second appeal in which this Court has considered the provisions of Order 7 Rule 3 of CPC as regards the description of the suit property. The decision does not assist the case of the petitioner for the reason that at this stage of seeking stay, the appellate Court is only required to consider whether any sufficient reason has been shown to stay the execution of the decree. The contentions which are being raised by the learned counsel for the petitioner are submissions on merits of the matter.

9. Having regard to the discussion above, there is no warrant for interference with the discretion exercised by the appellate Court. The petition stand dismissed.

SHARMILA U. DESHMUKH, J.