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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7588 OF 2015

Tatyrao s/o Devrao Mane
Age - 78 years, Occ - Agriculture
R/o Gadhwad, Latur
Taluka and District - Latur

PETITIONER

VERSUS

1. Gyandeo s/o Devrao Mane
Age - 68 years, Occ - Agriculture
2. Bhagirath s/o Gyandeo Mane,
Age - 38 years, Occ - Agriculture
3. Vaijinath s/o Gyandeo Mane,
Age - 43 years, Occ - Agriculture
4. Sow. Sangita w/o Bhagirath Mane,
Age - 33 years, Occ - Agriculture

RESPONDENTS

All R/o Gadwad, Latur
Taluka and District - Latur

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Mrs. Madhaveshwari Mhase - Thube, Advocate for the petitioner
Mr. S. V. Natu, Advocate for respondents

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 11th AUGUST, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.

2. This is a plaintiff's petition, purporting to pose a challenge to an appellate order, which reverses the order dated 3rd July, 2013 passed by the trial court on application for temporary injunction - Exhibit-5 in Regular Civil Suit No. 695 of 2012 pending in the court of civil judge, senior division, Latur. Trial court had allowed the application, which has been reversed by the appellate court in Miscellaneous Civil Appeal No. 50 of 2013 under order dated 27th March, 2015.

3. Learned advocate for the plaintiff - petitioner Mrs. Thube-Mhase and Mr. Natu, learned advocate for the defendant - respondents, are not at dispute on broad facts that partition had been effected between brothers, way back in 1976 and that the brothers got equal share of land in the same.

4. Learned advocate for the petitioner submits that pursuant to the partition of 1976, mutation entry bearing No.21 had taken place upon an application by present respondents which, in her submission, clearly refers to that the land had been divided into two halves and eastern half went to the share of respondents whereas the western portion had come to the share of petitioner. Learned advocate further points out that as far as old well is concerned, the defendants' half share in the same is not in

dispute and as such, during pendency of the suit, the plaintiff would not insist upon for temporary injunction in respect of the old well. It is, however, her contention that when the revenue record at the instance of the defendants shows that the eastern half share has gone to them, *prima facie* evidentiary value of said document ought not to have been ignored and overlooked by the appellate court. Learned advocate further submits that new well has been dug by the plaintiff and that the defendants have no share in the same. Since the new well is in the plaintiff's land holding, the defendants have no right to the same. It is being submitted that, however, the appellate court has grossly in error in overturning the decision by the trial court, simply on the basis of affidavits.

5. Mr. Natu, learned advocate for the respondents - defendants, however, submits that reference to eastern portion as is being stressed upon by learned advocate for the petitioner - plaintiff would not be proper, for, the land had been equally divided, means that area in the partition had been equal between two brothers, it does not necessarily give indication that the property had been vertically divided. According to him, there was '*udan*' division and the division of land had been according to a sketch map, which he purports to produce across the bar.

According to him, this map is part of record before the trial as well as the appellate court. He submits that after division between the brothers in 1976, there was further partition in the family of the defendants, that is to say, between him and his sons, under a suit instituted in 2006 wherein there is a categorical reference to digging of a well and a loan raised therefor. He goes on to submit that affidavits, which have been filed, are all of the adjoining land holders, who have unequivocally stated that the defendants are in possession of the land, as per the sketch map. Whereas the plaintiff has not been in a position to produce a single affidavit of adjoining land holder, as regards his possession. The affidavits produced by the defendants' side have been absolutely ignored by the trial court. Learned advocate further submits that the appellate court has taken an overall comprehensive view possible at this stage and has arrived at a certain conclusion with regard to possession on the date of the suit, which cannot be termed as perverse.

6. This aspect, however, is sought to be countered by learned advocate for the petitioner - plaintiff pointing out a passage from judgment of the appellate court, particularly paragraph No.16 and making it compare with paragraph No.10 of the plaint. It is thus being submitted by her that this is an indication that the

appellate court has gone about the matter cursorily.

7. After hearing rival submissions and on perusal of order passed by the trial court as well as that by appellate court, it appears that the trial court has presumed that by partition there has been a vertical divide, however, to support the same, at this stage, save the mutation entry, nothing is placed on record, which according to respondents only vaguely broadly conveys major portion and cannot be said to be specific about actual position. The affidavits filed on behalf of the plaintiff, though purport to supplement the same, they are not of neighbouring land holders.

8. In this peculiar case, it appears that this aspect has been overshadowed by various affidavits by the adjoining land holders including one by a person who is claimed to be a witness to actual partition coupled with the fact that the suit *inter se* the family members of the defendants, does refer to raising of loan for digging of a well in the property under concern. The trial court has referred to it, however, has not properly weighed its effect at this stage. In the circumstances, the presumption under which the trial court has laboured appears to be vulnerable on facts.

9. The appellate court appears to have taken stock of the situation upto present stage and has ruled that the plaintiff would not be able to secure temporary injunction. The order *per se* cannot be termed as perverse. In view of this, I am not inclined to interfere with the impugned order.

10. Writ petition, as such, stands dismissed. Rule stands discharged with no order as to costs.

11. Having regard to aforesaid, it would be worthwhile if the matter is decided on merits expeditiously. The trial court to proceed with the suit and dispose it of as expeditiously as possible, preferably within a period of eight months from the date of receipt of writ of this order. Aforesaid observations are for the purpose of decision in writ petition and the courts shall not be influenced by the same, while deciding the proceedings.

[SUNIL P. DESHMUKH, J.]