

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO.8628 OF 2013

Santoshkumar Jagdishlal Agrawal,
Age 48 years, Occu. Business,
R/o Agrawal Medical Stores,
Old Cloth Bazar,
Shirpur, District Dhule

..Petitioner

Versus

1. Shri Anil Vasantrao Lungase,
Age 50 years, Occu. Service,
R/o Plot No.92, Subhash Colony,
Near Banumay School,
Shirpur, District Dhule

2. Chief Officer,
Shirpur-Warwade Municipal Council,
Shirpur, District Dhule

..Respondents

Mr S.P. Shah, Advocate for petitioner

Mr A.V. Patil, Advocate for respondent No.1

Mr N.B. Suryawanshi, Advocate for respondent No.2

CORAM : N.W. SAMBRE, J.

DATE : 16th November 2015

PER COURT

1. The petitioner herein has questioned the order of refusal of injunction dated 7th February 2013, passed by learned Civil Judge, Junior Division, Shirpur, confirmed in appeal by the learned District Judge-2, Dhule vide order dated 1st March 2013.

2. It is the case of the petitioner that his father, a flood affected person was allotted plot by the District Administration some time in 1961. According to him, the District Administration, who had allotted the same in favour of his father cancelled the said allotment by order

dated 7th August 1972, as the father of the petitioner was unable to carry out construction. He would then urge that the mutation entry though was changed, however, the father of the petitioner remained in possession of the suit property, as he was never dispossessed after cancellation of allotment by following due process of law. After cancellation of allotment, the said plot was allotted to Subhash Co-operative Housing Society, which in turn allotted the same to one Prajapati and who thereafter sold the same to the present respondent No.1. According to petitioner, in the background of above referred facts, after the death of his father Jagdishlal, who was original allottee, the possession remained with him, which prompted him to file a suit for injunction for restraining the defendant from carrying out any construction over the suit property and also cancellation of the construction commencement permit granted by the Municipal Council – planning authority in favour of respondent No.1 – defendant Anil.

3. In the said suit bearing Regular Civil Suit No.17 of 2013, an application Exh.5 came to be moved under Order 39, Rule 1 and 2 of Code of Civil Procedure, which came to be rejected by learned Civil Judge, Junior Division, Shirpur vide order dated 7th February 2013 and confirmed in Misc. Civil Appeal No.9 of 2013 on 1st March 2013 at the behest of present petitioner, as such present petition.

4. Mr Shah, learned Counsel for the petitioner, while trying to make out a case for grant of injunction would urge that *Kabuliyat* was executed in favour of father of the petitioner way back in 1961 in relation to suit property. He would then urge that during the lifetime of his father, for non-fulfillment of the condition of allotment, same

was cancelled, though the D.I.L.R. has taken appropriate entry to that effect in record of rights, however, the possession of the property in question was never taken from the father of petitioner, who at that point of time was alive. Mr Shah would urge that the stay granted in favour of the present petitioner though was vacated and the property stood allotted in favour of another Co-operative Housing Society, the possession still continued with the petitioner after the death of his father. According to him, once the petitioner is in settled possession of property, he was entitled for injunction. So as to substantiate his contention, he has invited attention of this Court to photograph at record page 54 and submitted that the petitioner has constructed a shed so as to protect his property.

5. Learned Counsel Mr Shah while drawing support from the judgment of this Court in the matter of **Baban Anantrao Naik Vs. Sau. Pramila Uttamrao Yenare & Anr.**, reported in **2011 (6) ALL MR 15** and judgment of Apex Court in the matter of **Rame Gowda (dead) by L.Rs. Vs. M. Varadappa Naidu (dead) by L.Rs. and another**, reported in **(2004) 1 SCC 769**, would urge that unless the present petitioner is dispossessed from the property in question, who was in lawful possession of the same, his possession needs to be protected and as such, submits that a case for grant of injunction against the defendant was made out. However, the said proposition will be hardly of any assistance to the petitioner for the following reasons.

6. Learned Counsel for the respondent No.1 Mr Suryawanshi would urge that the orders passed by both the Courts speaks volumes about the conduct of the petitioner and his possession (lawful) over the suit property. According to him, both the Courts having concurrently held that the petitioner is not in lawful possession of the suit property, is not entitled for the injunction. He would then urge that the admitted facts on record depict that even if the allotment was made in favour of father of the petitioner, the same was cancelled for non-compliance of the conditions of allotment. According to him, during lifetime of the original allottee, i.e. father of the petitioner, the cancellation was never questioned and as such, is a case of acquiescence. Mr Suryawanshi then has invited attention of this Court to both the orders impugned, so as to urge that there is no right, title and interest to the suit property as is claimed by the petitioner – plaintiff and submits that the petition be dismissed.

7. Having heard Mr Shah at length, it is required to be noted that the principle as is sought to be relied upon by Mr Shah cannot be disputed that at the time of deciding the temporary injunction application, the factum of possession at that time must be a relevant factor. Whether such possession is lawful or not would be a matter of further inquiry which can be decided during the course of decision of the suit. Of course, the submission as is relied upon for which the support was drawn from the judgments in the matters of Rame Gowda and Baban Naik (cited supra) are required to be taken into account, however, what is noticed in the present case is the petitioner claimed to be an allottee of the plot for which he has neither produced any

allotment order in favour of his father nor any other documentary evidence so as to conclude that there was lawful allotment in favour of father of the petitioner and petitioner as lawfully succeeded to the same. Apart from above, the petitioner himself has produced on record the order of cancellation of allotment which was admittedly during the lifetime of father of petitioner and was not disputed or objected by his father. Apart from above, the fact remains that there are orders of the State Government allotting the property to one Housing Society, which in turn allotted the same in favour of one Prajapati and said Parajapati, upon permission from the Collector and upon payment of necessary revenue, has transferred the same in favour of respondent No.1. As such, the respondent No.1 appears to be in lawful possession of the suit property by virtue of the allotment and sale-deed in his favour. It is required to be noted herein that the said allotment in favour of Deelip Prajapat on 12th September 2005 and to the defendant No.1 in 2010 by virtue of permission from the Collector and necessary revenue entry to that effect was taken on 31st May 2010. Apart from above, there is hardly any evidence on record to support the case of the petitioner as regards ownership/possession. Once the petitioner asserts that he is in possession of the suit property, burden lies on him to establish so and in absence of any documentary or oral evidence to that effect both the Courts below, in my opinion, upon appropriate analysis of the evidence produced by rival parties have given finding that defendant No.1 is in lawful possession of the suit property. It is also required to be noted here that in view of concurrent findings recorded against the present

petitioner, no case for interference in extra-ordinary jurisdiction is made out before this Court. As such, petition fails, stands dismissed.

(N.W. SAMBRE, J.)

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