

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11871 OF 2013**

Dhanyakumar Malikarjun Mudke	)	
Age 55 years, Occ Service	)	
R/o Mardi, District Solapur	)	..Petitioner

Versus

Mahadev Shankar Nichare	)	
Age 55 years Occ Agriculturist	)	
R/o Hadpsar, Malawadi Survey No.165	)	
Sane Guruji Colony, Hadpsar, Pune -28	)	..Respondent

Mr. I. M. Khairdi for the Petitioner
None for the Respondent

CORAM : R. M. SAVANT, J.
DATE : 16th FEBRUARY, 2015

ORAL JUDGMENT

1 Rule. Looking to the challenge raised and the order that is required to be passed, made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 31-7-2013, passed by the Learned District Judge-3, Solapur, by which order, the Appeal in question being Misc Civil Appeal No.68 of 2013 came to be dismissed and resultantly the order dated 4-4-2013 allowing the Exhibit 5 passed in Regular Civil Suit No.74 of 2013 by the Learned 2nd Joint Civil Judge Junior Division, Solapur, came to be confirmed.

3 By order dated 21-8-2014, this Court had issued notice and the parties were accordingly put to notice that the Petition may be heard and disposed of at the admission stage. However, inspite of service on notice, none appears for the Respondent / Plaintiff.

4 It is not necessary to burden this order with unnecessary details. Suffice it to state that the Suit in question has been filed by the Respondent/Plaintiff for the relief that the Defendant should not carry out construction without authority on the suit property. It is the case of the Respondent/Plaintiff that his father Shankar Nichare was the owner of the suit property being house No.378 of Grampanchayat Mardi, Solapur. It his case that after the death of his father, the Plaintiff, his sisters and his mother became owners of the suit property and their names were accordingly recorded in the city survey record. It is the case of the Plaintiff that the Defendant without any authority is unauthorisedly constructing upon the suit property and the Plaintiff has therefore filed the Suit in question for the relief which has been adverted to herein above. In the said Suit, the Plaintiff filed an application for temporary injunction for restraining the Defendant from carrying out construction on the suit property. The Petitioner herein i.e. the Defendant filed his reply to the said application. It is the case of the Defendant that Grampanchayat House No.378 admeasuring 2600 sq.ft. i.e. 241.36 sq.meters, was owned by the Plaintiff's father Shankar Nichare. The said Shankar Nichare

sold the suit property to Manik Ghongade in the year 1972. The said Manik Ghongade sold the suit property to Somnath Ghadmode in the year 1994, out of the total suit property, the said Somnath Ghadmode sold an area of 1400 square ft. admeasuring 130.11 sq.mtrs. on the east side, to the Defendant, who had purchased it for and on behalf of the Swami Vivekanand Sarvajanic Vachanalaya Trust. Since the trust wanted to construct a library on the said property that it has undertaken the construction. It is the case of the Defendant that the Plaintiff in order to grab the suit property has filed the Suit in question. The Defendant therefore sought the dismissal of the said Suit.

5 The Trial Court considered the said application and has by the order dated 4-4-2013 allowed the same. Whilst allowing the said application the Trial Court, as the order discloses, has proceeded on the basis that there is more than one Defendant and has therefore referred to the Defendant in the order as the Defendant No.3. The Trial Court has in its order stated that it is the case of the Defendant that Kondabai who is the mother of the Plaintiff has sold the suit property to Manik Ghongade and since the document between Kondabai and the said Manik Ghongade was not produced, it was not possible to ascertain the right title and interest passed on by Kondabai to Manik Ghongade. The Trial Court has observed that there is no document to show that property CS No.515 and House No.378 are one and the same or that CS No.515 was later on renumbered as House No.378. The Trial Court further

observed that there is a vast difference in area of property No.515 which admeasures 81.2 sq.meter and property No.378 which admeasures 2600 sq.ft. / 241/36 sq.meter and therefore it was not possible to accept the case of the Petitioner that after the series of transactions the property has been transferred to the Defendant. The Trial Court therefore held that if the Defendant is allowed to carry out the construction over the suit property, then it would definitely prejudice the Plaintiff's right and accordingly allowed the application Exhibit 5 filed by the Plaintiff for temporary injunction by its order dated 4-4-2013.

6 The aggrieved Defendant carried the matter in Appeal by filing Misc Civil Appeal No.68 of 2013. The lower Appellate Court has proceeded on the same facts as the Trial Court and thereby confirmed the findings of the Trial Court in so far as the grant of temporary injunction is concerned. As indicated above, the lower Appellate Court has by the impugned order dismissed the Appeal filed by the Defendant.

7 In so far as the orders passed by the courts below are concerned, it is required to be noted that a perusal of the reply filed by the Defendant nowhere discloses that it is the case of the Defendant that Kondabai had sold the property to Manik Ghongade. In fact, the Defendant has specifically stated in his reply that in the year 1972, the Plaintiff's father Shankar Nichare sold the

property to the said Manik Ghongade. When it is not the Defendant's case that one of the intervening transactions was between Kondabai and Manik Ghongade, how the courts below have referred to the said transaction as the Defendants case, therefore begs an answer. Secondly, both the courts below have not considered the case of the Defendant that he has purchased the suit property by a registered Sale Deed from Somnath Ghadmode on behalf of the trust and in respect of which property there is an entry also made in the PTR register of the trust in question. The courts below have also not considered the matter from the aspect that the property has been purchased by the trust and therefore whether the relief sought by the Plaintiff could be adjudicated in the absence of the trust. In so far as the description of the property is concerned, the courts below ought to have adjudicated upon the same as the Defendant is laying a claim to the property bearing house no.378 where as the Plaintiff has described it as CS No.515. If the property is situated in a gaathan how the property was given CS number is therefore required to be looked into. For the aforesaid reasons, the order passed by the Trial Court dated 4-4-2013 as also the impugned order dated 31-7-2013 would have to be quashed and set aside and are accordingly quashed and set aside and the application Exhibit 5 would have to be relegated back to the Trial Court for a denovo consideration in the light of the observations made herein above. On remand, the Trial Court would consider the application Exhibit 5 afresh by giving proper opportunity to the parties. The parties to appear before the Trial Court on 9-3-2015. The Trial

Court to thereafter decide the application Exhibit 5 within 8 weeks. The Petitioner to serve a copy of the instant order on the Respondent or on his Advocate in the Trial Court. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]