

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION St.NO.24727 OF 2015**

Sonabai Jagannath Avhad & Ors.

..Petitioners

Vs.

Shivaji Ananda Avhad

..Respondent

Mr. Krishna Holambe Patil for the Petitioners

Mr. M. S. Karnik a/w Mr. Sachin Gite for the Respondent

CORAM : R. M. SAVANT, J.

DATE : 9th SEPTEMBER, 2015

PC.

1 The Writ Jurisdiction of this Court is invoked against the order dated 17-8-2015 passed by the Learned District Judge-2, Nashik, by which order, the Appeal filed by the Petitioners herein came to be dismissed and resultantly the order dated 3-8-2015 passed by the Trial Court i.e. the Learned Civil Judge Junior Division, Sinnar, came to be confirmed.

2 There is therefore a concurrent finding recorded against the Petitioners and in favour of the Respondent herein. Both the Courts below on the basis of the material on record have held that the Petitioners are not entitled to the exercise of discretion.

3 The Suit in question has been filed as a consequence of the order dated 10-12-2014 passed by the Sub Divisional Officer (SDO) Niphad, Division Niphad, District Nashik. The said order is passed in the exercise of the powers under Section 138(2) of the Maharashtra Land Revenue Code (for short MLRC). The proceedings under Section 138(2) were initiated by the Respondent as according to him the Petitioners herein had encroached upon the land bearing Gat No.773 which belongs to the Respondent. The said proceedings were based on the survey which was carried out on 8-7-2013 of the lands in question pursuant to which a map was prepared and in the said map the encroachment of the Petitioners in so far as the said Gat No.773, was identified. It appears that prior to the instant application the Respondent had invoked the said provision i.e. Section 138(2) for removal of the encroachment, however, the SDO who was delegated the powers of the Collector, had by order dated 27-12-1993 rejected the said application on the ground that it would not be possible for the Collector to adjudicate between the two parties as it seems that the non Applicants to the said application were in possession for a long period of time and therefore raised questions of right title and interest which can be only adjudicated by a Civil Court. It is much thereafter that the measurement was carried out on 8-7-2013 which measurement disclosed that the situation had changed on site in so far as the encroachment carried out by the Petitioners is concerned. The said application being Encroachment Case No.31 of 2013 was adjudicated by the SDO Niphad,

Division Niphad, District Nashik. Before the SDO, the ground was raised on behalf of the Petitioners that the instant application filed for removal of encroachment under Section 138(2) of the MLRC was hit by the principles of Resjudicata. The said ground of objection was not countenanced by the SDO who held that the instant application being filed pursuant to the measurement which was carried out on 8-7-2013, the Respondent herein was entitled to invoke Section 138(2). The SDO thereafter by his order dated 10-12-2014 directed that the opponent i.e. the Petitioners herein to hand over possession of the lands mentioned in the map prepared by the Deputy Superintendent of Land Records dated 23-5-2015 of the portion shown in Orange, Pink and Green colours. Against the said order dated 10-12-2014, the Petitioners filed an Appeal being RTS Appeal No.1 of 2015 before the Additional Collector, Nashik, which Appeal came to be dismissed by the Additional Collector, by order dated 4-6-2015.

4 In terms of the scheme of Section 138 after the order is passed under Section 138(2) any person who is ejected or is about to ejected may from the date of the ejectment or the settlement of the boundary institute a Civil Suit to establish title. It is having regard to Sub Section 4 of Section 138 that the Petitioners filed Regular Civil Suit No.119 of 2015. In the said Suit, the substantive relief sought was for a declaration that the Defendant is not entitled to possession on the basis of the illegal order passed by the SDO

Niphad, in Encroachment Case No.31 of 2013. Pertinently the declaration of title was not claimed. In the said Suit, an application for temporary injunction came to be filed by the Plaintiffs. The temporary injunction was sought to be effect that the possession should not be taken in terms of the said order passed by the SDO and a case was sought to be set up that there are standing crops, well, house and cattle shed in the land which is covered by the order passed by the SDO. The Trial Court considered the said application and by order dated 3-8-2015 rejected the said application. The Trial Court held that the order passed by the SDO in Encroachment Case No.31 of 2013 exemplifies the fact that the Defendant i.e. the Respondent herein had followed due process of law to obtain possession. The Trial Court rejected the case of the Plaintiffs i.e. the Petitioners herein that there are standing crops, well, house and cattle shed. The Trial Court recorded a finding that the house claimed by the Plaintiffs is in Gat No.778 and not in Gat No.773. The Trial Court further observed that the Plaintiffs have not placed any material on record to show that they had title to the disputed property. The Trial Court lastly observed that the injunction cannot be granted against the true owner and accordingly rejected the application by its order dated 3-8-2015.

5 The Plaintiffs aggrieved by the said order dated 3-8-2015 carried the matter by way of an Appeal being Civil Misc Appeal No.89 of 2015. The Lower Appellate Court having regard to the findings recorded by the Trial

Court at the prima facie stage, did not find any reason to interfere with the order passed by the Trial Court. In fact the Lower Appellate Court observed that the Plaintiffs are merely prolonging the matter in respect of the handing over possession of the encroached portion. The Lower Appellate Court observed that the Suit filed by the Plaintiffs i.e. Regular Civil Suit No.119 of 2015 is not the one which is contemplated under Section 138(4) of the MLRC as title to the land is not claimed. The Lower Appellate court as indicated above has accordingly dismissed the Appeal by the impugned order dated 17-8-2015. As indicated above there is a concurrent finding recorded against the Petitioners.

6 The Learned Counsel for the Petitioners Mr.Holambe Patil would contend that the Petitioners/Plaintiffs are in long standing possession dating back to the year 1984. The Learned Counsel further contends that though the Suit originally did not contain a prayer for declaration of title, an amendment has been moved by the Plaintiffs seeking the said relief. It is also the submission of the Learned Counsel that once the application was rejected by the SDO on the earlier occasion then the Respondent / Defendant was not entitled to file a fresh application for removal of encroachment.

7 Per contra, the Learned Counsel appearing on behalf of the Respondent Mr. Karnik would support the impugned order. The Learned

Counsel drew this Courts attention to the relief sought in the Suit filed by the Plaintiffs being Regular Civil Suit No.119 of 2015 where the relief of declaration of title is conspicuously absent. The Learned Counsel would contend that in the light of the fact that a fresh measurement was carried out in the year 2013 which reflected the change in scenario on the ground level in respect of the encroachment that the Defendant i.e. the Respondent herein was entitled to file the application.

8 Having heard the Learned Counsel for the parties, in my view, there is no merit in the above Petition. As indicated above, the adjudication has taken place in Encroachment Case No.31 of 2013 pursuant to which the SDO has passed an order directing the removal of encroachment as shown in the map prepared by the Deputy Superintendent of Land Records. Against the said order, the non Applicants have a remedy by way of a Suit which they were required to file based on title. A reading of the plaint as originally filed discloses that the only substantive relief that is claimed is a declaration that the Defendant is not entitled to take possession on the basis of an illegal order passed by the SDO. It is well settled that a person even in illegal possession has to be dispossessed by following the due process of law. The Respondent / Defendant in the instant case had accordingly invoked Section 138(2) of the MLRC which proceedings after following the gamut have culminated in the order dated 10-12-2014. The Petitioners / Plaintiffs have not been able to

produce any material to show a semblance of title to the encroached portion, in fact the Plaintiffs are claiming title on the basis of adverse possession. It is trite that the plea of adverse possession can only be used as a shield and not as a sword, that too by the Defendant and the Plaintiffs cannot claim title on the basis of adverse possession. A useful reference could be made to the judgment of the Apex Court in the matter of **Gurudwara Sahib Vs. Gram Panchayat Village Sirthala & Anr.**¹

9 In the light of the concurrent orders passed by the courts below, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]

¹ (2014) 1 Supreme Court Cases 669