

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

WRIT PETITION NO. 11411 OF 2015

Digamber Rohidas Agawane

..Petitioner

Vs

1.Hemant Nandkumar Shitole
and Ors.

.. Respondents

Mr. Vishwanath S. Talkute, Advocate for Petitioner.
Mr. Prafulla Shah a/w Mr. K.P.Shah, Advocate for Respondents
no.1 and 2.

CORAM : R.G.KETKAR,J.
DATE : 04/12/2015

PC:

1. Heard Mr. Vishwanath Talkute, learned counsel for the petitioner and Mr. Prafulla Shah, learned counsel for the respondents no.1 and 2 at length.
2. By this Petition under Article 227 of the Constitution of India, original defendant no. 1 has challenged the Judgment and order dated 23.10.2015 passed by the learned District Judge, Satara in Misc. Civil Appeal No.158 of 2015. By that order, the learned District Judge allowed the Appeal preferred by respondents 1 and 2, herein after referred to as 'plaintiffs', and quashed and set aside the Judgment and order dated 13.8.2015 passed by the learned 3rd Jt. Civil Judge, Senior Division, Satara below Exhibit-5 in Spl. Civil Suit No.44 of 2015. The learned

District Judge allowed the application taken out by the plaintiffs at Exhibit-5 and issued injunction restraining the petitioner, hereinafter referred to as 'defendant no.1', from disturbing the peaceful possession of the plaintiffs over land admeasuring 4 Hectors 22R comprised in Gat No.48/2 at Mouze Suravadi, Tq.Phaltan, District-Satara (for short, 'suit land').

3. Mr. Talkute submitted that the plaintiffs instituted suit, inter alia, praying for cancellation of sale deed dated 7.2.2015 (wrongly typed as 6.2.2015) executed by respondent no.3, hereinafter referred to as 'defendant no.2', in favour of defendant no.1 and for declaration that the said sale deed is not binding on the plaintiffs' share; for perpetual injunction restraining defendant no.1 from disturbing peaceful possession of the plaintiffs as also from ousting the plaintiffs from the suit land without following due process of law; for damages to the tune of Rs. 4.50 lacs from defendant no.1.

4. During the pendency of the suit, the plaintiffs took out application Exhibit-5 for temporary injunction. By Judgment and order dated 13.8.2015 the learned trial Judge rejected the application. While rejecting the application, the learned trial Judge considered the material on record and held that the plaintiffs have purchased 1H 76R from Gat No.48 and not 4H 22R, as claimed by them. Mr. Talkute submitted that the plaintiffs have

deliberately given incorrect description of the suit land and tried to mislead the court. The learned trial Judge held that the plaintiffs did not approach the court with clean hands, as they did not produce sale deeds executed in their favour in 1988 and which were registered in 1993. The plaintiffs also suppressed the fact from the Court that the permission of Rehabilitation department was obtained in the year 1993. The sale deeds of 1988 are illegal as before execution of the sale deeds permission of rehabilitation department was necessary and the permission was obtained in 1993. After considering the two sale deeds dated 29.8.1988 in favour of husband of plaintiff no.2-Nandkumar and plaintiff no.2, the learned trial Judge recorded a categorical finding that the plaintiffs have purchased southern portion to the extent of 1H. 76R from Gat no.48.

5. As against this, the learned District Judge held that the plaintiffs have purchased 4H. 22R. The said finding is contrary to (1) 7/12 Extracts for the years 2002-2003 to 2011-2012 where in the column of 'Occupier' Hemant Nandkumar Shitole and Ms Vasudha Nandkumar Shitole are shown to be in possession of 88R each (in all, 1H. 76R); (2) Village Form No.6 which is in respect of Mutation Entry no.1359. This mutation entry recorded that the plaintiffs have purchased 1H 76R; (3) The sale deeds dated 22.3.1988 executed by Baburao S. Jagtap in favour of Naik

Nibalkar Deostan and in particular description of Gat No.48 and the boundaries mentioned therein. The sale deed, though was presented on 22.3.1988, the permission of the officer was obtained only on 6.3.1992 and the sale deed was registered only on 9.3.1992; (4) sale deed dated 29.8.1988 executed by Babu Savta Mali in favour of plaintiff no.2 - Vasudha Nandkumar Shitole and in particular the description of Gat no.48. Though the sale deed was presented for registration on 29.8.1988, the permission of Collector, Rehabilitation Branch, Satara was obtained on 7.4.1993 and the sale deed was registered on 13.4.1993; (5) The sale deed dated 29.8.1988 executed by Babu S. Mali in favour of Nandkumar Shitole and in particular description of Gat No. 48 and boundaries mentioned therein. The sale deed, though was presented for registration on 29.8.1988, permission of Collector, Rehabilitation Branch, Satara was obtained on 7.4.1993 and the sale deed was registered on 13.4.1993. Relying upon these sale deeds, 7x12 extracts as also mutation entry, Mr. Talkute submitted that the plaintiffs have purchased 1H 76R. In any case, there was no permission for purchasing more than 1H. 76R. Consistent with this, Mutation Entry no.1359 recorded ownership of the plaintiffs in respect of 1H 76R.

6. That apart, father of the plaintiff Babu Savta Mali died on 9.5.1990. Hence, sale deeds could not have been registered in

the year 1993. Boundaries of sale deed dated 29.8.1988 executed by Babu in favour of plaintiff no.2- Vasudha are as under:

<u>Gat No.</u>	<u>Area</u>	<u>East</u>	<u>South</u>	<u>West</u>	<u>North</u>
48	8H 44R Village boundary Road of Nibhore			Gat no 48 & 49	Gat No.16 & 18

The boundaries in sale deed dated 29.8.1989 executed by Babu in favour of Nandkumar, husband of plaintiff no.2 are as follows:

<u>Gat No.</u>	<u>Area</u>	<u>East</u>	<u>South</u>	<u>West</u>	<u>North</u>
48	8H 44R Village boundary Road of Nibhore			Gat no 48 & 49	Gat No.16 & 18

Comparison of boundaries of sale deed dated 29.8.1988 executed by Babu in favour of plaintiff no.2-Ms Vasudha , with boundaries in sale deed dated 29.8.1988 executed by Babu in favour of Nandkumar shows that the boundaries described in both the sale deeds are one and the same. It, therefore, cannot be said that they have purchased 4H 22R. The plaintiffs have purchased area of land admeasuring 1H 76R, out of Gat no.48 and not more than that. This is also substantiated by the revenue record. In short, he submitted that the learned District Judge committed serious error in considering the documentary evidence on record which clearly shows that the plaintiffs are in

possession of southern portion of Gat no.48 to the extent of 1H. 76R.

7. Mr. Talkute further submitted that though the sale deeds were executed in the year 1988, the same were registered in the year 1993 and admittedly Babu expired on 9.5.1990. The sale deeds could not have been registered in 1993. The sale deeds will become effective only from the date of registration and not from the date of execution in the year 1988. He further submitted that during the pendency of application Exh.5, the learned trial Judge had appointed Commissioner for inspection of the site and submit report. In pursuance thereof, the Commissioner had submitted report and the map at Exh.60. In the map portion 'ACFL' clearly shows possession of defendant no.1 in respect of 2h 46 Ares. In that portion, the Commissioner recorded that new meter connection stands in the name of defendant no1. Defendant no.1 had also dug new bore-well and had erected tin shed. Thus, perusal of the commissioner's report also depicts that defendant no.1 is in possession of the area shown by letters "ACFL" admeasuring 2H 46 Ares and the plaintiffs are in possession of 1H 76 Ares, as shown in the letters "HFQN". He submitted that the learned District Judge was not justified in interfering with the discretionary order passed by the learned trial Judge merely because another view is possible. The learned

District Judge has not properly applied principles regulating granting or rejection of injunction. He, therefore, submitted that the petition requires consideration.

8. On the other hand, Mr. Shah supported the impugned order. He submitted that perusal of the sale deed dated 22.3.1988 shows that Naik Nibalkar Deostan had sold 4H 22R to Baburao Jagtap. The said Baburao Jagtap, in turn, had sold 4H 22R by two separate registered sale deeds dated 29.8.1988, firstly, in the name of plaintiff no.2 and secondly in the name of Nandukar Shitole, husband of plaintiff no.2 and father of plaintiff no.1. He submitted that both these sale deeds were presented for registration immediately upon execution on 29.8.1988 and were registered after obtaining permission from Collector, Rehabilitation Branch, Satara on 13.4.1993. He relied upon Section 47 of the Registration Act, 1908 to contend that a registered document shall operate from the time from which it would have commenced to operate, if no registration thereof had been required or made, and not from the time of its registration. He further relied upon Index-II in respect of Gat no.48 which shows that plaintiff no.2 had purchased 4 Anna share from Gat no.48, ademasuring 8H 44 Ares (2H 11 Ares) and also Index-II showing husband of plaintiff no.2 Nandkumar had purchased 4 Anna share out of 8H 44R of Gat no.48 (i.e. 2H 11 Ares) and thus

have purchased 4H 22Ares. He also relied upon the 7/12 extracts which clearly show that right from 1992-93 onwards, the plaintiffs are cultivating land admeasuring 4H 22 Ares.

9. Mr. Shah also heavily relied upon statement of defendant no.2, Kisan, son of vendor Babu recorded on 16.10.1993 and the decision rendered by Tahasildar, Phaltan on 9.12.1993 in Vahivat case no.8 of 1991. The said decision was rendered in proceedings under Rule 31 of the Maharashtra Land Revenue Record of Rights and Registers (Preparation and Maintenance) Rules, 1971 (for short, 'Rules'). In pursuance thereof, Mutation Entry no.1400 was certified on 28.12.1993 by Circle Officer. In this mutation entry, the names of Nandkumar and plaintiff no.2 are recorded in respect of half share in Gat no.48. Thus, the plaintiffs have purchased 4H 22 Ares being half of 8H. 44 Ares of Gat No.48.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The short question is whether the learned District Judge was justified in interfering with the order passed by the trial Court which is undoubtedly a discretionary order.

11. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has laid down the following principles:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

12. If the tests laid down by the Apex Court in the above Judgment are applied to the facts of the present case, it has to be held that the trial Court has exercised the discretion arbitrarily and perversely.

13. As noted earlier, the sale deeds dated 29.8.1988 clearly depict that the plaintiffs have purchased 4H 22R from Gat no.48. Reliance placed by Mr. Talkute on (1) Mutation Entry No.1359, (2) 7/x12 Extracts, is of no assistance as the revenue records do not decide issue of title. The plaintiffs are claiming title on the basis of the sale deeds. The sale deeds are executed on 29.8.1988. It is also not in dispute that the sale deeds were presented for

registration on the same day. Merely because the sale permission was given subsequently, that does not prima facie affect the validity of the sale deeds. The sale deeds have also been registered after obtaining the permission from Collector, Revenue Branch, Satara. In view of Section 47 of the Registration Act, 1908, in my opinion, prima facie the sale deeds will become effective from the date they were executed.

14. Perusal of Vahivat case and in particular statement of defendant no.1-Kisan Jagtap, son of vendor, also shows that on 16.10.1993 he had made statement to the effect that the plaintiffs are in possession of 8 Anna share from Gat no.48, i.e.4H 22 Ares. It is not in dispute that Gat no.48 admeasures 8H 44 Ares. Thus, the statement made by Kisan Jagtap, son of vendor, way back in the year 1993 also supports the case of the plaintiffs that they are in possession of 4H 22 Ares. Based on that statement, Tahasildar, Phaltan had passed order in proceedings under Rule 31 of the Rules, whereby the Tahasildar had recorded vahivat of the plaintiffs in respect of half share of 8H 44R of Gat No.48.

15. Rule 30 of the Rules lays down procedure of making entries in register of Crops. Rule 31 lays down that during the course of inspection of crops under Rule 30, Talathi shall verify whether person actually possession of survey number or sub

division of survey number is the one whose name is recorded in the record of rights. In proceedings under Rule 31, statement of defendant no.2 Kisan Babu Mali (Jagtap), son of vendor, was recorded on 16.10.1993 and the order was passed by the Tahasildar on 9.12.1993. Thus, right from 1993 names of the plaintiffs have been recorded in respect of 4H 22R of Gat no.48. The 7/12 Extracts also support the case of the plaintiffs and indicate that the plaintiffs are cultivating the suit land to the extent of 4H 22R. It is material to note that selfsame Kisan has executed sale deed in favour of defendant no.1 on 7.2.2015.

16. Mr. Talkute relied upon the report of the Court Commissioner. The learned trial Judge observed in paragraph 17 that "the said report shows that defendant no.1 is in possession of 2H 46R and defendant no.1's name-plate is displayed on the northern side. Though the plaintiffs claim that they are in possession of 4H 22R of entire Gat no.48/2 the same is not substantiated from the report of the Court Commissioner and map. The plaintiffs are claiming possession on the basis of the sale deeds executed in 1988. However, whether the sale deeds executed are legal or not, is to be established by leading evidence. Even the revenue record indicates that the plaintiffs are in possession of 88R each, i.e. 1 H 76R".

17. The report was considered by the learned District Judge in

paragraph 19. The learned District Judge observed that when there is controversy about possession between the parties, such controversy has to be decided by Court alone and cannot be decided by the Court Commissioner. The learned District Judge dealt with Commissioner's report and observed "as to on what basis the Court Commissioner came to the conclusion that electric motor and pipelines and other structure were erected by defendant no.1 and consequently he (Court Commissioner) opined that the northern portion is occupied by defendant no.1. Defendant no.1 claims to be in possession of 2H 46R towards the northern part of Gat no.48/2. It is for the defendant to establish that by legal recognised mode, the plaintiffs' possession was terminated. There is not a single piece of paper which proves that since the sale deeds in favour of the plaintiffs were registered to the extent of 88R each, the remaining portion was withdrawn from them by mentioning specific boundaries. Even though there is name-plate displaying the name of defendant no.1, that cannot, ipso facto, be taken as possession of defendant no.1. Rather the possibility of disturbance of defendant no.1 to the possession of the plaintiffs cannot be ruled out. Otherwise also the relevancy of the report of the Court Commissioner is a matter of dispute as per provisions of Rules 10 and 11 of Order 26."

18. In paragraph 17, the learned District Judge considered two separate sale deeds executed by Babu in favour of plaintiff no.2 and Nandkumar, husband of plaintiff no.2. Each sale deed was executed for the area to the extent of 4 Anna from Gat no.48. The learned District Judge also considered proceedings in Vahivat Case No.8 of 1991 as also Mutation Entry no.1400. In paragraph 18, the learned District Judge also considered submissions advanced on behalf of defendant no.1 the he plaintiffs were put in possession only to the extent of 2 Anna share in Gat no.48. Defendant no.1 himself admitted that the plaintiffs purchased 1H 76R. In my opinion, even assuming the case of defendant no.1 that the plaintiffs have purchased 88R each, namely 1H. 76R to be true and correct, the same is not substantiated from the two sale deeds. Perusal of the sale deed dated 29.8.1988 executed by Babu in favour of plaintiff no.2 shows that he has executed sale deed to the extent of 4 Anna share in 8Anna of Gat no.48 admeasuring 8H 44R. 8 Anna share out of 8H 44R comes to 4H 22R (half). Out of this portion, he had sold 4 Anna share, i.e. 1H 05R (1/4th share). Likewise, perusal of the sale deed dated 29.8.1988 executed by Babu in favour of Nandkumar shows that he has executed sale deed to the extent of 4 Anna share in 8 Anna of Gat no.48 admeasuring 8H 44R. 8 Anna share out of 8H 44R comes to 4H 22R (half). Out of this portion, he had sold 4

Anna share, i.e. 1H 05R (1/4th share). Thus, the plaintiffs have purchased 2H 10R which is more than 1 H 76R.

19. Mr. Talkute submitted that the plaintiffs are not entitled to any equitable relief. The learned trial Judge has held that the plaintiffs have suppressed the material facts and did not approach the Court with clean hands. In paragraph 13, the learned trial Judge observed that in the plaint as also application Exhibit-5, the plaintiffs have specifically referred to the sale deeds of 1988. Along with plaint, the plaintiffs have annexed several documents. However, the plaintiffs did not annex sale deeds of 1988 which were registered in the year 1993. The plaintiffs also concealed that though the sale deeds were executed in the year 1988, permission of Rehabilitation Department was obtained in the year 1993 and the sale deeds were registered in the year 1993. Though the plaintiffs were relying upon the sale deeds of 1988, they did not enclose those sale deeds along with plaint. It is, therefore, evident that at the time of instituting the suit itself, the plaintiffs decided not to disclose that the permission of Rehabilitation Department was obtained in the year 1993 when the sale deeds were registered. The plaintiffs have disclosed facts which are convenient to them and have concealed facts which are against them.

20. The learned District Judge has also considered whether the

plaintiffs have suppressed material facts and answered that issue in favour of the plaintiffs. In paragraph 21, the learned District Judge observed that the plaintiffs have positively come with the case that they have been enjoying possession on the basis of title. The learned District also considered Mutation Entry no.1359 as also Mutation Entry no.1400 and order in Vahivat case and observed in paragraph 22 that there is no attempt to conceal or hide about defective title of the plaintiffs, more so when the plaintiffs have produced Index-II extracts along with plaint. In paragraph 23 the learned District Judge also held that the plaintiffs are claiming possession on the basis of the sale deeds executed by predecessor-in-title of defendant no.1 himself as also statements made by defendant no.2 Kisan admitting possession of the plaintiffs. Even the order of Competent Revenue Officer in Vahivat case wherein it is held that the plaintiffs are in possession of 4H 22 R, substantiates the case of the plaintiffs that they are in possession of half share in Gat no.48, i.e. 4H 22R. In my opinion, nothing turns on the reasons given by the learned trial Judge in paragraph 13. In view thereof, the learned District Judge rightly interfered with the order passed by the learned Judge.

21. After considering the material on record as also the orders passed by the learned trial Judge and the learned District Judge, I

am satisfied that the learned trial Judge has exercised the discretion arbitrarily or capriciously or perversely. The learned trial Judge has ignored settled principles of law regulating grant or refusal of interlocutory injunction. The learned trial Judge has not exercised the discretion reasonably and in judicial manner. In particular, the learned trial Judge has ignored:

- (i) statement made by defendant no.2 Kisan son of vendor Babu, dated 16.10.1993 wherein he categorically stated that the plaintiffs are in possession of 8 Anna share in Gat no.44;
- (ii) order dated 9.12.2013 passed by Tahasildar, Phaltan in proceedings under Rule 31 of the Rules;
- (iii) plaintiffs are claiming injunction on the basis of two separate sale deeds dated 29.8.1988. If the contention of defendant no.1 that boundaries of these sale deeds are one and the same is accepted, then, prima facie, there was no necessity for executing two separate sale deeds, one in favour of plaintiff no.1 and another in favour of husband of plaintiff no.2;
- (iv) 7/12 extracts as also Mutation Entry no.1400 clearly show that the plaintiffs are in possession of 4H 22R;
- (v) learned trial Judge also at interlocutory stage went into issue of validity or otherwise of the sale deeds of the plaintiffs and has not considered effect of section 47 of the Registration Act, 1908;

(vi) principle that possession follows title is also ignored by the learned trial Judge.

22. In the light of the above, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

23. At this stage, Mr. Talkute prays for stay of this order and District Court's order for a period of 4 weeks from today. As I have upheld the order of the learned District Judge which records that the plaintiffs are in possession, it is not possible to stay the order passed by the learned District Judge issuing injunction against defendant no.1. Hence, oral application is rejected.

24. It is expressly made clear that the observations made herein are tentative and prima facie and are made only for the purpose of considering correctness of the impugned order. The learned trial Judge will decide the suit on the basis of evidence on record and on its own merits in accordance with law uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

(R.G.KETKAR, J.)