

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10416 OF 2015

Narayan Savaleram Gorde and others ...Petitioners

versus

Babasaheb Narayan Gorde and others ...Respondents

WITH
WRIT PETITION NO. 345 OF 2016

Narayan Savaleram Gorde and others ...Petitioners

versus

Babasaheb Narayan Gorde and others ...Respondents

.....
Mr. Sandeep Gorde Patil, advocate for the petitioners
Mr. S.S. Chapalgaonkar, advocate for respondent Nos. 1 to 3
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 18.01.2016**

**Date of pronouncing
the Order: 28.01.2016**

ORDER:-

1. Leave to delete respondent No.4 in both the petitions at the risk of the petitioners. By consent of learned counsel for the parties, heard finally.

2. Both the writ petitions are being decided by this common order,

considering the facts involved in writ petition No. 10416 of 2015.

3. The petitioners-plaintiffs instituted a suit for decree of perpetual mandatory injunction restraining thereby the respondents-defendants from obstructing the use of water of well situated in Gat No. 213 to irrigate the lands situated in other Gat numbers. The petitioners-plaintiffs had purchased the land out of Gat No.213 under registered sale deed in the year 1995 in the name of respondent-defendant No.1. In the year 2000, petitioner No.1 dug a well in the land Gat No.213. The said land Gat No.213 situated at south side of canal and therefore, the well is fetching much water than expected. Furthermore, petitioner No.1 has laid pipeline to irrigate the lands situated in Gat No. 321, 354 and 344. It is the case of the petitioners-plaintiffs that the water from well in Gat No.213 is stored in the well situated in Gat No.321 and also pipeline is laid to take the water to other Gat numbers. The petitioners-plaintiffs further contended that there was obstruction and resistance from the respondents-defendants from using water of the well situated in Gat No.213. Even the respondents-defendants cut down the pipeline and also put the lock on the panel board of electric starter. The respondents-defendants contend that the suit property Gat No.213 is self acquired property of respondent No.1-defendant purchased out of his own income. Even the land Gat No.321 though stands in the

name of petitioner No.2-plaintiff, is given to respondent No.1 for cultivation. During pendency of suit, the petitioners-plaintiffs filed an application below Exh.8 for appointment of Court Commissioner to verify the status of the suit property. Thus, with consent of both the sides, the Court Commissioner was appointed. The Court Commissioner visited the site and submitted its report below Exh.23 alongwith sketch map. The petitioners-plaintiffs filed an application Exh.5 for issuance of temporary injunction, as the respondents-defendants stopped water supply to the lands situated in other Gat numbers from the well situated in Gat No.213 and also put lock on the panel board of electric starter. The respondents-defendants resisted the application Exh.5. The learned Judge of the trial court, after considering the rival contentions and also the report of Court Commissioner, allowed application Exh.5 and thereby restrained the respondents-defendants from obstructing use of water by the petitioners. The trial court has also directed to restore the electric connection and to open lock put on panel board of electric pump installed on the well situated in Gat No.213. Being aggrieved by the same, the respondents-defendants preferred Misc. Civil Appeal No.24 of 2015 before the District Court, Kopergaon. The learned District Judge-1, Kopergaon by its judgment and order dated 19.9.2015 allowed the appeal and set aside the order passed by the trial court below Exh.5 and rejected the said application. Hence, this

writ petition.

4. Learned counsel for the petitioners submits that there is no partition as on today effected between the parties and some property is purchased in the name of joint family members as per family arrangement. Learned counsel submits that the lower appellate court has failed to appreciate the fact that water of well dug in land Gat No.213 is used for irrigation purpose of the lands situated in other Gat numbers and due to obstruction by respondents-defendants, the crops situated in other lands are likely to be damaged. Learned counsel further submits that lower appellate court has not considered the report submitted by the Court Commissioner, which clearly discloses that the water from well situated in Gat No. 213 is brought to the land of Gat Nos. 354 and 344, through the land Gat No.321. It is also clear from the report of Commissioner that water through the pipeline is brought from land Gat No.213 and the water is stored in the well situated in Gat No.321. Even the report of Commissioner also supports the case of the petitioners-plaintiffs that after putting lock to the starter of electric motor, the petitioners-plaintiffs are being prevented from using water to irrigate the lands in Gat Nos.354 and 344. Learned counsel further submits that the lower appellate court has not considered that the co-sharers of the joint family property cannot be prevented in the like manner to enjoy the property.

Counsel further submits that the lower appellate court has erroneously observed that one of the co-sharers cannot claim separate possession of land of joint family property. Learned counsel further submits that the lower appellate court has not considered that there is no acceptance on the part of respondents-defendants about existence of pipeline from Gat No.213 to the lands situated in other Gat numbers and even the storage of water in the well situated in Gat No.321. Learned counsel submits that even the lower appellate court has not considered the affidavits of the labourers filed on record. The lower appellate court lost sight that the said well dug in land Gat No.213 as the land Gat No.213 is situated near canal. Learned counsel thus submits that the District Judge-1 Kopergaon has committed error in allowing the appeal and by rejecting application Exh.5. Learned counsel submits that prima facie case is made out in favour of the petitioners-plaintiffs and balance of convenience also lies in their favour. Learned counsel further submits that the petitioners-plaintiffs are likely to face irreparable loss whereas no loss is likely to be caused to the respondents-defendants.

Learned counsel for the petitioners in order to substantiate his submissions, places reliance on the judgments in following cases:-

- i) Ayyaswami Gounder vs. Munnuswamy Gounder, reported in 1984 (4) SCC 376,
- ii) Tanushree Basu & Ors vs. Ishani Prasad Basu and Ors, reported in 2008 (4) SCC 791 and
- iii) Budh Ram & others vs. Bansi and Ors. reported in 2010 (11) SCC 476

4. Learned counsel for the respondents submits that the respondent-defendant No.1 purchased land Gat No.213 from his own income and dug a well in land Gat No.213 and laid pipeline by installing electric motor pump. As such, land Gat No.213 and well situated therein is his self acquired property. It is further submitted that by oral partition, land Gat No.321 also came to be allotted to his share and same is in his exclusive possession. Thus, the respondent-defendant No.1 laid pipeline from land Gat No.213 to land Gat No. 321 and irrigating the lands situated in Gat No.321 being exclusive owner thereof. There is no any pipeline from land Gat No.213 to land Gat No. 354 and 344. Learned counsel submits that there is common well in land Gat No.321 from which the pipeline is laid to land Gat No.354 and 344 respectively, however, there is no connection of pipeline from well Gat No.213. Learned counsel submits that as per pleadings of the petitioners-plaintiffs every co-sharer has right in the property and therefore, injunction cannot be

granted in favour of the petitioners-plaintiffs. Learned counsel further submits that as per own case of the plaintiffs, the suit property is joint family property and thus, instead of instituting suit for partition, the petitioners-plaintiffs have instituted the suit simplicitor for injunction. Learned counsel submits that the suit for permanent injunction against co-sharers without claiming partition is not maintainable. Learned counsel submits that in view of the above, there is no prima facie case made out in favour of the petitioners-plaintiffs. Learned Judge of the lower appellate court has rightly set aside the order passed by the trial court and rejected the application Exh.5.

Learned counsel for the respondents in order to substantiate his submissions, places reliance on the judgments in the following cases:-

- i) Anathula Sudhakar vs. P. Buchi Reddy and others, reported in AIR 2008 SC 2033,
- ii) Bachaspati Bhattacharya and Ors. vs. Smt. Mira Bhattacharjee and Ors, reported in AIR 2008 Calcutta 68,

6. I have considered the pleadings, the documents filed on record, report of Court Commissioner and the submissions made on behalf of both the parties. The petitioners-plaintiffs have come with a specific case that the land Gat No.213 and land Gat Nos. 354 and

344 are joint family properties and still no partition has been effected. The respondent-defendant No.1 is son of the petitioner No.1-plaintiff. Respondent-defendant Nos. 2 and 3 are the sons of respondent-defendant No.1. Respondent-defendant No.4 is married daughter of petitioner No.1-plaintiff. The respondent No.1-defendant states that he has purchased land Gat No.213 from his own income and as such it is his self acquired property. Even though land Gat No.321 is standing in the name of petitioner No.2-plaintiff, the respondent-defendant No.1 claims that in oral partition the said land was allotted to his share. According to the respondents-defendants, there is no pipeline from well situated in land Gat No.213 up to land Gat Nos. 354 and 344.

7. In the backdrop of these rival pleadings, I have carefully perused the report of Commissioner, which points out that the land Gat No.213 is situated towards southern side of the canal and there is one well situated in land Gat No.213. It has also specifically mentioned in the Commissioner's report that there is electric motor and pump on the said well. There is lock to panel board. It has also mentioned that there is siphon of 4" in width taken to other land by crossing Shrirampur-Astegaon road. The said siphon is approximately 4000 ft. in length. It has also specifically mentioned that in land Gat No.354 there are openings of said siphon for

irrigating the said land. It has also specifically mentioned that in Gat No.321 there is well towards its western side and one electric motor is installed on it. It has also mentioned in the Commissioner's report that the water brought from well situated in Gat No.213 through siphon is found stored in the well situated in Gat No.321. It has specifically mentioned in the Commissioner's report that the said siphon thereafter continued from Gat No.321 towards land Gat No. 344. It has also noted in the Commissioner's report that compared to other wells the water level in the well situated in land Gat No.213 is more adequate.

8. The lower appellate court has observed that the possession of one co-sharer on any portion of the joint family property is presumed on behalf of all co-sharers and as such one of the co-sharer cannot claim separate possession on any portion of the land of joint family. There is no reason to dispute this legal position. However, considering the peculiar facts of case in hand, the lower appellate court has observed that the water of well situated in land Gat No.213 is being used by all co-sharers and therefore, there must be workable arrangement for enjoying the right to use the well water by each of co-sharers. The lower appellate court has further observed that it is not clear as to how and up to what share each of the co-sharers is enjoying the right of water from the well situated in Gat No.213 and

unless the share in water is determined, the use of right to take water from said well by each of the co-sharers cannot be determined.

9. It appears from the pleadings of the parties that the well situated in Gat No.213 dug long back. It also appears from the sale deed that a small portion of land was purchased from Gat No.213 for the reason that the same is situated near canal. In this case, there is no explanation from respondent-defendants that if the land Gat No.213 is self acquired property of respondent-defendant No.1, then why the pipeline is laid from Gat No.213 to land Gat No. 321 and therefrom to land Gat Nos. 354 and 344, which is approximately 4000 ft. in length irrigating the lands which are subject matter of the suit. Every co-sharers has right to possess and enjoy each and every portion of property equal to that of other co-sharers. If this legal proposition is accepted, then the respondents-dependents, in my opinion, cannot resist the petitioners-plaintiffs from enjoying water of the well situated in land Gat No.213 from irrigating the other lands. Even due regards to all technical aspects of the case, it cannot be overlooked that there is strong prima face case in favour of the petitioners-plaintiffs and if the injunction is refused, standing crops in other lands will be damaged for want of water. The same is also significant in view of the fact that there is less rainfall during the last two years and the water level also marginally reduced in the region.

This arrangement of enjoying water of well situated in Gat No.213 to other lands situated in other Gat numbers is in existence since many years and the same is also evident from the length of siphon, the well used for the purpose of storing water in Gat No.321 etc. At this stage, there is no need to determine specific share of the co-sharers in the water of well situated in land Gat No.213.

10. In view of the above discussion, I am inclined to allow this writ petition by setting aside the order of learned District Judge, Kopargaon dated 19.9.2015 in Misc. Civil appeal No. 24 of 2015.

11. So far as the writ petition No. 345 of 2016 is concerned, the application filed by the petitioners-plaintiffs at Exh.38 came to be rejected in view of the fact that Misc. Civil Appeal No. 24 of 2015 is allowed by the District Court. Thus, in the light of observations made herein-above, the order passed below Exh.38 is required to be quashed and set aside and to direct the trial court to pass appropriate order on the said application Exh.38 after hearing both the parties. Hence, the following order:-

O R D E R

I. Both the writ petitions are hereby allowed.

- II. The order passed by the learned District Judge-1 Kopargaon, dated 19.9.2015 in Misc. Civil Appeal No.24 of 2015 is hereby quashed and set aside. The order passed by the learned 2nd Joint C.J.J.D. Rahata below Exh.5 in R.C.S. No. 322 of 2015 stands confirmed.
- III. The order passed by the learned 2nd Joint C.J.J.D. Rahata dated 7.11.2015 below Exh.38 in R.C.S. No.322 of 2015 is hereby quashed and set aside. The trial court shall hear both the parties on application Exh.38 afresh and pass appropriate order in accordance with law.
- IV. Both the writ petitions are disposed of in the above terms. No costs.

(V. K. JADHAV, J.)

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