

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 45 OF 2016

MUJIBKHAN HASANKHAN
VERSUS
MOHAN ROCHALDAS TOLWANI AND OTHERS

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Advocate for Petitioner Mr. Kasliwal Ajit D.
Advocate for Respondents 1,2 and 3: Mr. R.S. Deshmukh

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CORAM : V. K. JADHAV, J.
DATED : 1st MARCH, 2016

PER COURT:-

1. By consent, heard finally at admission stage.
2. The petitioner-original plaintiff instituted a suit bearing R.C.S. No. 73 of 2015 for decree of perpetual injunction. During pendency of suit, the petitioner-original plaintiff had also filed an application Exh.5 for issuance of temporary injunction. Respondent Nos. 1 to 3-original defendants appeared in the said suit and resisted the suit as well as application at Exh.5, by filing written statement. The trial court, after hearing the parties allowed application Exh.5 by order dated 22.9.2015. The respondents-original defendants being aggrieved by the same, preferred Misc. Civil appeal No. 157 of 2015 before the District Court at Aurangabad. The learned District Judge-7, by impugned order dated 26.10.2015 allowed the said appeal and thereby set aside the order passed by the trial court below Exh.5.

Hence, this writ petition.

3. Learned counsel for the petitioner submits that the petitioner had purchased the property under registered sale deed for valuable consideration and there is recital in the sale deed that the possession of land was delivered to him at the time of execution of sale deed. Learned counsel submits that the trial court has rightly allowed the application Exh.5 and learned District Judge has erroneously allowed the Misc. Civil appeal thereby setting aside the order passed by the trial court below Exh.5.

4. Learned counsel for the respondents-original defendants submits that one Fakrulla Khan and his son Asadullah Khan had purchased the suit property out of Gat No. 136 admeasuring 4 Hectare 94 R, to the extent of 20 R. Learned counsel submits that as per the petitioner-original plaintiff's pleading, the petitioner had purchased the land admeasuring 10 R out of land Gat No.136 from said Asadullaah Khan under registered sale deed. Learned counsel submits that there was no division of the property amongst Fakrulla and said Asadullah Khan. Learned counsel further submits that prima facie it appears from the documents placed on record that the petitioner had purchased undivided property from Asadullah Khan under sale deed. Consequently, there is no demarcation and

property is not identified. Learned counsel submits that therefore, no relief could be granted to the petitioner by way of issuance of temporary injunction. Learned counsel further points out that in the instant matter, the boundaries itself are wrongly mentioned by the petitioner-plaintiff in the suit. Learned counsel submits that the learned District Judge has thus rightly allowed the Misc. Civil appeal by setting aside the order passed on application Exh.5 by the trial court. Learned counsel submits that here is no substance in the writ petition and writ petition thus is liable to be dismissed.

5. *Prima facie*, it appears that there is no division of property amongst Asadullah Khan and his father Fakrullah Khan so far as land admeasuring 20 R of Gat No. 136 is concerned. Even the entries in 7x12 extract shows that said land is jointly owned by them. The petitioner, in the year 2009 under registered sale deed, has purchased 10 R land out of land Gat No. 136 from Asadullah Khan. *Prima facie*, it appears that the petitioner had purchased undivided share of said Asadullah Khan. The same is also evident from the pleadings of the petitioner that boundaries of entire 20 R land are shown. Even in the sale deed, the boundaries of entire 20 R land are shown. Under these circumstances, the learned District Judge has observed that property in dispute is not identifiable. It also appears that the boundaries are wrongly mentioned.

6. From the impugned order, it appears that the lower appellate court has observed that there is no document evidencing delivery of possession to the plaintiff. However, at this stage, such observation, which goes to the root of the matter, is not required to gone into and the same is thus ignored. The trial court has to independently assess the evidence and after full fledged trial, decide the same on its own merits.

7. In the light of above, I find no fault in the impugned order passed by the learned District Judge-7, Aurangabad dated 26.10.2015 in Misc. Civil Appeal No. 157 of 2015. Thus, there is no merit in the writ petition and the writ petition is thus liable to be dismissed. The writ petition is accordingly dismissed. No costs.

(V. K. JADHAV, J.)

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