

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10689 OF 2015**

Chandrabhagabai Sayaji Tiwade
and Ors.

Petitioners

Vs

Shri Digambar Waman Aher and
Ors

.. Respondents

Mr. Satyajeet P. Dighe, Advocate for Petitioners.
Mr. P.B.Naiknaware, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 28/04/2016

PC:

1. Heard Mr. Satyajeet Dighe, learned counsel for the petitioners and Mr.P.B.Naiknaware, learned counsel for the respondents at length.
2. Rule. Mr. Naiknaware waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 25.8.2015 passed by the learned District Judge-5, Nashik in Misc. Civil Appeal No.144 of 2013. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as 'plaintiffs', and quashed and set aside the Judgment and order dated 13.11.2013 passed by the learned

Jt. Civil Judge, Jr. Dn. Nashik below Exhibit-5 in R.C.S. No.183 of 2013 to the extent of rejecting the prayer of the plaintiffs for injunction restraining the defendants from disturbing their possession till the disposal of the suit. The learned District Judge issued injunction restraining the defendants from interfering with the possession of the plaintiffs over the suit property without following due process of law.

4. The plaintiffs have instituted suit in the year 2013 for specific performance of agreement of sale dated 22.1.1993 and for perpetual injunction restraining the defendants from creating third party interest as also from causing obstruction to their possession over the property, more particularly described in paragraph 1 of the plaintiff (for short, 'suit property'). The plaintiffs came with the case that on 21.9.1992 document styled as "Issar Pavti" was executed by Sayaji Tivade, father of the defendant in favour of Waman Aher, the father of the plaintiff. On the same day, possession receipt was executed by Sayaji in favour of Waman. In paragraph 4, there is recital to the effect that Sayaji has handed over possession of the suit property to Waman. On 22.1.1993, Sayaji executed agreement of sale in favour of Waman. In paragraph 5, there is a recital to the effect that on 21.9.1992 Sayaji has handed over possession to Waman and there is no grievance about possession. It is the case of the plaintiffs that as the suit property is Watan land, defendants are

required to obtain permission from Collector before executing the sale deed. The plaintiffs, therefore, prayed for specific performance of agreement dated 22.1.1993 by directing the defendants to execute the sale deed in their favour after obtaining all necessary permissions and for perpetual injunction.

5. During the pendency of the suit, the plaintiffs took out application Exhibit-5 for temporary injunction restraining the defendants from creating third party interest as also disturbing their possession. The defendants filed Written Statement as also Say to Exhibit-5 resisting the suit as also application Exhibit-5. The defendants denied the assertions made by the plaintiffs. In short, it is the case of the defendants that they have not executed agreement of sale in favour of the plaintiffs and that they are in possession. Reliance was also placed on the measurement carried out on 8.2.2012 and fixation of boundaries and putting of wire fencing as also 7/12 extracts. The learned trial Judge partly allowed the application Exh.5 and issued injunction restraining the defendants from creating third party interest. So far as the prayer for injunction restraining the defendants from disturbing the possession of the plaintiffs is concerned, the said prayer was turned down. While rejecting the prayer for injunction restraining the defendants from causing obstruction to the plaintiffs' possession, the learned trial Judge considered 7/12 extracts and came to the conclusion that the

defendants are in possession and the plaintiffs are not in possession of the suit property.

6. Aggrieved by that decision, the plaintiffs preferred Appeal before the learned District Judge. By the impugned order, the learned District Judge has allowed the Appeal. It is against this order, the defendants have instituted the present petition.

7. Mr. Dighe reiterated the submissions that were advanced before the Courts below. He submitted that learned District Judge while allowing the appeal has, however, not considered the 7/12 extracts as also the measurement map which is produced on record. Non-consideration of relevant material itself is a ground for interfering with the impugned order. He submitted that while deciding the application-Exh.5, the learned trial Judge has properly exercised the discretion and also followed the principles regulating/refusing the grant of injunction. As against this, learned District Judge, without considering the relevant material on record, has allowed the Appeal. He, therefore, submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr. Naiknaware supported the impugned order. He submitted that the possession receipt dated 21.9.1992 and in particular paragraph 4 thereof, clearly records that Sayaji, father of the defendants, had handed over possession to Waman, father of the plaintiffs. Even the agreement of sale dated 22.1.1993 and in particular paragraph 5

thereof, records that Sayaji handed over possession to Waman on 22.9.1992 and there is no grievance in respect of handing over possession. He submitted that since the agreement of sale was executed on 22.1.1993 in respect of Watan land, before execution of the sale deed permission of the Collector is necessary. As the sale deed is not executed in favour of the plaintiffs, their names were not entered into the revenue record. He, therefore, submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the impugned order shows that the learned District Judge has not considered the entire material on record and more particularly 7/12 extracts as also measurement carried out and fixation of boundaries in the year 2012 and 2013 respectively. As noted earlier, the learned trial Judge partly allowed the application Exh.5, thereby, restraining the defendants from creating third party interest. The defendants have not challenged this order. After considering the material on record, learned trial Judge held that the defendants are in possession and not the plaintiffs. While recording finding in this regard, the learned trial Judge has considered 7/12 extracts. As against this, the learned District Judge has not considered this material on record.

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

“14., 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.”

11. The very fact that the learned District Judge has not considered the entire material on record, itself, vitiates the impugned order. In view thereof, the impugned order is set aside and Misc. Civil Appeal No.144 of 2013 is restored to the file of the learned District Judge. Hence, the following order.

(i) Order dated 25.8.2015 passed by the learned District Judge-5 Nashik in Misc.Civil Appeal No.144 of 2013 is set aside. Order of the trial Court is revived. Misc. Civil Appeal No.144 of 2013 is restored to the file of the learned District Judge.

(ii) While deciding the Appeal, the learned District Judge will consider entire material on record referred, herein above, and any other material which is on record and pass appropriate order in accordance with law. Rule is made absolute in the above terms with no order as to costs. All contentions of the parties on merits are expressly kept open.

(R.G.KETKAR, J.)