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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11571 OF 2015

Iqbal Ahmed Hafiz Khalil Ahmed and others ... Petitioners

Vs.

Ziyauddin Yusuf Ali ... Respondent

Mr.Uday P. Warunjikar i/b Mr.Asif I.Patel, Advocate for the
Petitioners.

Mr.Anilkumar K.Patil, Advocate for Respondent.

CORAM : R.G.KETKAR, J.

DATE : 04th JANUARY, 2016

P.C. :

. Heard Mr.Uday P. Warunjikar, learned Counsel for the
petitioners and Mr.Anilkumar Patil, learned Counsel for the
respondent at length.

2. By this Petition under Article 227 of the Constitution of
India, original defendants have challenged the judgment and order
dated 25/06/2015 passed by the learned Civil Judge, Junior
Division, Malegaon below Exhibit 5 in Regular Civil Suit No. 75 of
2015 as also the judgment and order dated 05/10/2015 passed by
the learned Ad-Hoc District Judge – 2, Malegaon, Dist. Nashik in
Civil Misc. Appeal No. 31 of 2015. By these orders, the Courts
below allowed the application made by the respondent, hereinafter
referred to as plaintiff and issued temporary injunction restraining

the petitioners, hereinafter referred to as defendants, from obstructing plaintiff's possession over the land bearing Gat No. 169/1 admeasuring 19R along with well having boundaries as under :

towards East : Remaining land out of Gat No.169 P
towards West : Remaining land out of Gat No.169 P
towards South : Land bearing Gat No. 168 P and
towards North : Shiv road (Daregaon Shivar)

situate at village – Savandgaon, Taluka - Malegaon, District – Nashik (for short 'suit land'), more particularly described in paragraph 1 of the plaint as also issued injunction restraining the defendants from fixing electric motor on the well located in the suit land.

3. Mr.Warunjikar has taken me through i) the sale deed dated 09/10/2007 executed by Rahibai Vishwanath Pawar in favour of the defendants and in particular boundaries described therein as also ii) the rectification deed dated 16/01/2015 and in particular boundaries described therein; iii) sale deed dated 03/05/2010 executed by Murlidhar Phula Pawar in favour of the plaintiff and boundaries described therein; iv) Exhibit 'C' - the rough sketch at page no. 73 of this Petition. Mr.Patil submitted that Exhibit 'C' at page 73 of this Petition is not on the record of the Courts below; v) prayers in the Suit and in particular prayer clause (a); vi) rough sketch annexed along with the plaint at page 81 of this Petition as also vii) the report dated 05/06/2015 made by Tahsildar, Malegaon to the Additional Collector, Malegaon.

4. He submitted that defendants have purchased 31 R out of Gat No. 169/1 and 88 R from Gat No. 169/3. He submitted that there is no dispute between the parties that on 07/11/1989, Gat No. 169/1 in all admeasuring 81R was partitioned as under :

“ 0.33 R Murlidhar Phula Pawar
0.33 R Rahibai Vishwanath Pawar
0.5 R Barku Phula Pawar
0.5 R Raghunath Phula Pawar
0.5 R Bapu Phula Pawar”

5. The defendants have purchased 31 R from Rahibai on 09/10/2007. As against this, plaintiff had purchased 19 R from Gat No.169/1 from his vendor Murlidhar Pawar on 03/05/2010. The sale deed dated 09/10/2007 also refers to existence of well in Gat No. 169/1. However, there was mistake while describing eastern and northern boundaries. In view thereof, on 16/01/2015, rectification deed was executed and mistake committed while describing eastern and northern boundaries was rectified. He submitted that the Courts below committed error in holding that the well in question is situate in the property purchased by the plaintiff and not the defendants. The Courts below ignored the report dated 05/06/2015 made by Tahsildar, Malegaon as also affidavits of adjoining land owners which clearly supports the case of the defendants that the well in question is situate in the property purchased by the defendants and not the plaintiff. He, therefore, submitted that the impugned orders deserve to be interfered with.

6. On the other hand, Mr.Patil supported the impugned orders. He submitted that the Courts below after considering the material on record have concurrently held that the plaintiff has made out i) prima facie case ii) balance of convenience lies in his favour and iii) irreparable loss will be caused to the plaintiff in case, the injunction is not granted. The Courts below also prima facie, concurrently held that the well in question is situate in the plaintiff's property. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. 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 well is situate in the suit land as claimed by the plaintiff or in the property purchased by the defendants. The learned trial Judge while allowing the application has observed in paragraph 17 that in the sale deed of the plaintiff, the existence of well appears on page 3 as also the boundaries described in the sale deed and in the Suit are in conformity. In pursuance of the sale deed, mutation entry No. 1340 was made. The plaintiff has also produced 7/12 extract of Gat No. 169/1 part along with the list at Exhibit 3/1.

8. In paragraph 18, the learned trial Judge observed that upon perusing 7/12 extract, there is reference of well in the suit land as also in the mutation entry No. 1340. The learned trial Judge

further observed that all the recitals in the sale deed of defendants dated 09/10/2007 are typed written, save and except the existence of well. In paragraph 20, the learned trial Judge noted that by letter dated 20/05/2015, Tahsildar, Malegaon had fixed the date of enquiry at 10.00 a.m. on 29/05/2015. The notice was, however, served on the brother of plaintiff at 11.33 a.m. on 29/05/2015. It was further noted that though the Tahsildar in his report relied upon the statements of the witnesses, the alleged statements of those witnesses are also not on record. The learned trial Judge also dealt with panchanama dated 29/05/2015 and observed that the word “well” appearing in the panchama has been written subsequently and that it can be clearly seen that it is over written. Aggrieved by this enquiry, plaintiff has made application on 30/05/2015 for inspection of the suit land in his presence and for conducting enquiry afresh. After considering the material on record, the learned trial Judge held that well is situate in the suit land and accordingly, issued injunction.

9. As far as the Appellate Court is concerned, this aspect is considered by the learned District Judge in paragraph 11. The learned District Judge also noted that though defendants claimed ownership on the basis of the sale deed executed in the year 2007, rectification is made only in the year 2015. In paragraph 14, the learned District Judge also noted that the development that took place during the pendency of the Appeal namely the electric motor

was in the name of Murlidhar - vendor of the plaintiff and now it is transferred in the name of plaintiff.

10. As far as the report by Tahsildar, Malegaon is concerned, this aspect is considered in paragraph 16. The learned District Judge also held that plaintiff has established the ingredients for issuing injunction as also existence of well in the suit land. Thus, perusal of the material on record shows that the Courts below concurrently found that plaintiff has established that well is situate in the suit land. In view thereof, I do not find that the Courts below have committed any error in passing the impugned orders. Hence, Petition fails and the same is dismissed. It is made clear that observations made herein are for the purpose of considering the correctness of the impugned orders and while deciding the Suit, the learned trial Judge will decide the Suit on the basis of the evidence on record and in accordance with law uninfluenced by the observations made herein.

(R.G.KETKAR, J.)