

Sequeira

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

WRIT PETITION NO. 499 OF 2016

Shri Sharad Laxman Shinde,
Age about 65 years, Occupation -
Agriculturist,
Residing at – 9/4, Chandrolya Co-operative
Housing Society, S.T.Road, Chembur,
Mumbai 400 071.

.. Petitioner

Vs.

Shri Balaram Tatu Mhase
Aged 47 years, Occupation - Agriculturist,
Residing at – Nikop, Taluka Karjat,
District Raigad.

.. Respondent.

Mr.U.B.Nighot, for the Petitioner.
Mr.Rohit Joshi, for the Respondent.

***CORAM : N.M.Jamdar, J.
Friday, 7 October 2016.***

Oral Order :

Rule. Rule made returnable forthwith. Respondent waives service. By order dated 6 October 2016 parties were put to notice that Petition will be taken up for final disposal.

2. By this petition, the Petitioner challenges the order passed by the learned District Judge Raigad Alibaug dated 24 June 2015 allowing the Miscellaneous Civil Appeal No.7 of 2013 and Miscellaneous Civil Appeal No.7 of 2013 filed by the Respondent – Plaintiff. The Respondent-Plaintiff filed Regular Civil Suit No.44 of 2010 for adjudication that the sale deed dated 18 August 1990 executed in favour of the Petitioner be declared as void and the Petitioner be restrained from disturbing the possession of the Respondent-Plaintiff by an order of permanent injunction. In this suit an application for temporary injunction was taken out by the Respondent-Plaintiff below Exhibit 5. The Petitioner filed Written Statement, counter claim and reply to the application below Exhibit 5 and also sought an order of injunction against the Respondent by filing the application under Exhibit 18. The learned Civil Judge by order dated 5 January 2013 allowed the application filed by the Petitioner below Exhibit 18 and dismissed the application filed by Respondent-Plaintiff below Exhibit 5. The learned Civil Judge held that the Petitioner has duly purchased the suit property and all the relevant entries are in his favour and the Respondent has failed to show any tenancy right in the suit property. Two appeals were filed by the Respondent-Plaintiff challenging these orders which have been allowed by the impugned order by the learned District Judge, Raigad-Alibaug.

3. Heard learned counsel for the parties.

4. The suit has been filed by the Respondent on the ground that the Respondent is a tenant in the suit property. The Respondent has not controverted the ownership right of the Petitioner. The Petitioner has duly purchased the suit property by way of a sale deed dated 18 August 1990. It is also not in dispute that pursuant to the sale deed, the mutation entries have been effected in favour of the Petitioner. The Petitioner has also produced on record the land revenue paid from the year 1996 to 2012. The Petitioner has paid the water charges as well. The mutation entries earlier are in the name of the predecessor of the Petitioner and thereafter in the name of the Petitioner. On the basis of this position, the learned counsel for the Petitioner has assailed the order by the learned District Judge. The learned District Judge has observed in the impugned order that there are documents produced by both the sides and therefore the adjudication will be difficult. While observing so the learned District Judge has not kept in mind the scope of an appeal from a discretionary order passed by the trial Court. The scope of an appeal against the discretionary order has been indicated by the Apex Court in the case of *Wander Limited and another Vs Antox India P. Ltd. - 1990 (Supp) Supreme Court Cases 727*.

5. The learned District Judge has given weightage to the affidavits which have been produced by the Respondent in which the

deponents / neighbours have averred that the Respondent is in possession. The learned District Judge has also taken note of the tenancy claim of the Respondent. Therefore, the entire evidence relied upon by the Petitioner as a true owner and in whose name entries have been carried out and who is paying taxes as on date has been discarded on the basis of a tenancy claim by the Respondent and affidavits of the neighbours.

6. The learned counsel for the Respondent relying on the decision of the Division bench of this court in the case of *Marybai Marshal Pimenta & another Vs Ramnath Gopal Bhuskute & another* – 1987 Mh.L.J. 628 submitted that it is not impermissible for the Civil Court to protect the possession of a party when he claims to be in possession pending a Reference or while making a Reference under section 85-A of the Bombay Tenancy and Agricultural Lands Act, 1948. There cannot be any dispute regarding this settled position. But in the present case there is no such reference made as yet and a decision has already been taken by the authority. The Tahsildar, in an application filed by the Respondent under section 70-B of the Bombay Tenancy Act, by order dated 11 March 2010 rejected the application filed by the Respondent for declaration of tenancy. It is informed that appeal proceedings are pending. However the order passed by the Tahsildar holds field as on date. The Tahsildar while dismissing the application under section 70-B observed that the Respondent had assailed that he had cultivated the

land by handing over the stipulated quantum of grain, however he did not produce any documentary evidence in that regard. The Tahsildar also held that the tenancy claim has been made by a tenant who is a member of the joint family a landlord and therefore, such claim of tenancy cannot be made. A reference is also made to a payment receipt by the Applicant.

7. Therefore going by the order passed under section 70-B by the Tahsildar, no prima facie case in favour of the contention of the Respondent that he is a tenant, exists. If that case is kept aside then all that the Respondent has is affidavits of the neighbours. It was contended that the Respondent had taken crops and there are receipts prior to the year 1971. That may be so but after the year 1971 there are no receipts in favour of the Respondent. Therefore, even though the learned District Judge failed to consider the legal effects of the document produced by the Petitioner, who ownership is not in dispute and has arrived at a erroneous finding whereby injunction granted against the true owner on a prima facie unsustainable claim of tenancy, unsupported by any document of possession. The learned counsel for the Respondent submitted that the mutation entries are only for fiscal purpose. This position is correct however, mutation entries are not the only document on which reliance is placed by the Petitioner.

8. Prima facie therefore it appears that after selling the property

to the Petitioner, the Petitioner is thereafter in possession is paying all the taxes and a claim of tenancy has been set up by the vendor to obstruct the possession of the Petitioner of his near relatives i.e. the Plaintiff. The learned Civil Judge was therefore, right in not accepting such claim made against the true owner of the property. The learned District Judge was in error in disturbing the use of discretion by the learned Civil Judge and drawing inference which is not warranted in law. In the circumstances, the Petitioner is entitled to succeed. The Writ Petition is allowed. Rule is made absolute in terms of prayer clause (b).

9. It is clarified that the observations made in this order as well as orders passed by the learned Civil Judge Junior Division Karjat and the learned Principal District Judge, Raigad-Alibaug are prima facie and the suit will be decided on its merits.

(N.M.Jamdar, J.)