

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO. 648 OF 2015

(CHUNNILAL MADHOJI SAKHARE...VS..THE STATE OF MAH. THR. MINISTRY OF HOME & 6 OTH.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATED : FEBRUARY 23, 2016.

Heard Shri R.D.Karode, advocate for the petitioner, Shri V.R. Borkar for the respondent Nos. 4 and 7 and Shri T.A. Mirza, A.P.P. for the respondent Nos. 1 and 2. No-one appeared for the other respondents, though served.

2. The respondent No.7 claiming to be the owner and in possession of the suit field on the basis of the sale-deed registered on 29th January, 2011 had filed Regular Civil Appeal No. 23 of 2011 seeking decree for declaration that she is the owner of the suit field and is in possession of it. The present petitioner was defendant No.2 in the civil suit. The civil suit came to be dismissed by the judgment dated 10th September, 2012. In paragraph 19 of the judgment, the trial Court recorded as follows :

“19. In the sale deed though it is mentioned that the possession is handed over immediately at the time of execution of the sale deed, there is nothing on record to show the previous owner was in possession and later on the possession was handed over to the plaintiff. Mere entry in the 7/12 extract on the basis of the sale deed cannot be taken into consideration that plaintiff is in possession. In

order to show possession the agriculture assessment or the receipt issue by the Talathi to show the possession and the payment of the assessment is not placed on record. Therefore on the basis of the sale deed and entry in the 7/12 abstract Exh.11, it cannot be said that the plaintiff is any possession. Therefore on the basis of the evidence on record plaintiff failed to prove her title, ownership and possession over the suit property. Therefore, I have recorded my findings to issued no.1 and 2 in the negative.”

The judgment and decree passed by the trial Court was challenged in Regular Civil Appeal No. 163 of 2012 which came to be dismissed by the judgment dated 20th February, 2013. The appellate Court concurred with the findings recorded by the trial Court on the point of possession and recorded as follows :

“... In this case, except 7/12 extract there is no evidence in support of the claim of the appellant that Manjubai Chandrikapure, was in possession of the suit property and later on, appellant came in possession. It is important to note that the appellant did not examine any witness who saw the fact that suit property was under cultivation of Manjubai Chandrikapure and later on, it came in possession of the appellant.”

Second Appeal No.287 of 2014 was filed before this Court by the present respondent No.7 which is summarily dismissed on 30th July, 2014. The present respondent No.7 had filed Misc. Civil Application No. 1191 of 2014 seeking review of the order passed by this Court in Second Appeal which is also dismissed on 14th August, 2015.

3. In the civil suit, the present petitioner had filed counter claim seeking decree for declaration that he acquired title in respect of the suit field by adverse possession. The claim made by the present petitioner was rejected.

4. On the report made by the present respondent No.7, proceedings under Section 145 of the Code of Criminal Procedure were initiated and the Sub-Divisional Magistrate has passed the impugned order concluding that the respondent No.7 is in possession of the suit field and directed the Police Authorities to restrain the present petitioner from committing any illegal act by entering the suit field. The petitioner, being aggrieved by the order passed by the Sub-Divisional Magistrate, has filed this writ petition.

5. Shri R.D. Karode, advocate for the petitioner has pointed out the findings recorded by the competent Civil Court on the point of possession and has submitted that in view of the findings recorded by the Civil Court, it was not open for the Sub-Divisional Magistrate to deal with the point of possession.

6. Shri V.R.Borkar, learned advocate for the respondent Nos.4 and 7 has raised preliminary objection to the maintainability of the writ petition on the ground that the impugned order can be assailed in revision under Section 397 of the Code of Criminal Procedure. It is further submitted that the respondent No.7 is in lawful possession of the suit field on the basis of the sale-deed registered on 29th January, 2011. The learned advocate has pointed out the report submitted by Talathi stating that the respondent is in possession of the suit field and she has sown crops in the field

in 2015-16. It is submitted that relying on the report submitted by the Talathi and considering the other material on record, the Sub-Divisional Magistrate has rightly passed the impugned order. It is submitted that the claim of the petitioner for declaration that he has acquired title in respect of the suit field by adverse possession is rejected by the Civil Court and therefore, it is not open for the petitioner to claim that he is in possession of the suit field. The learned advocate for the respondent Nos.4 and 7 has submitted that the present petitioner has filed Regular Civil Suit No.15 of 2015 praying for decree for injunction restraining the present respondents from interfering with his possession over the suit field. It is submitted that the trial Court has granted temporary injunction in favour of the petitioner and that order is challenged by the present respondent No.7 before the District Court in Misc. Civil Appeal No. 30 of 2015 and the learned District Judge by order dated 25th November, 2015 has stayed the effect and operation of the order passed by the trial Court. It is submitted that in the above circumstances, it cannot be said that the impugned order is unsustainable and is required to be interfered with.

7. Shri T.A. Mirza, learned A.P.P. has supported the impugned order.

8. After considering the facts on record, it is clear that the Sub-Divisional Magistrate has misused his powers. The learned advocates have submitted that the documents relating to the earlier civil litigation were placed on the record of the Sub-Divisional Magistrate. The Sub-Divisional Magistrate has conveniently overlooked the relevant material while passing the impugned order. The conduct of the Sub-

Divisional Magistrate speaks volumes. It is not understood as to how the Sub-Divisional Magistrate could have recorded that the respondent No.7 is in possession of the suit field when the claim of the respondent No.7 that she is in possession of the suit field since the date of sale-deed i.e. since 29th January, 2011, has been rejected by the Civil Court, by the District Court and also by this Court. The impugned order suffers from patent illegality and is unsustainable.

9. Considering the facts of the case, I am not inclined to accept the submissions made on behalf of the respondent Nos.4 and 7 that the present writ petition need not be entertained as the impugned order can be assailed in revision under Section 397 of the Code of Criminal Procedure.

10. Hence, the following order :

- i) The impugned order is set aside.
- ii) The proceedings initiated under Section 145 of the Code of Criminal Procedure are quashed.
- iii) Writ Petition is allowed with costs quantified at Rs.Twenty Thousand to be paid by the respondent No.7 to the petitioner within one month.
- iv) Copy of this order be sent to the Collector, Gondia for information. In addition, the learned A.P.P. shall also send copy of this order to the Collector, Gondia and to the Divisional Commissioner, Nagpur.

CRI.APPLN.(APPW) NO. 19/2016.

In view of disposal of the writ petition, the application for vacating the interim order, granted in favour of the petitioner, has become infructuous, and it is disposed of accordingly.

JUDGE

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