

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

Writ Petition No.5985 of 2015

(Shri Rama s/o Chandrabhan Akare and another
vs.
Smt. Manda w/o Dhanraj Potbhare and another)

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*Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.*

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Court's or Judge's Orders

Shri R.R. Srivastava, Advocate for the petitioners.
Shri Mir Nagman Ali, Advocate for respondent no.1.

CORAM : A.S. CHANDURKAR, J.

DATE : 25th JULY, 2016.

Heard.

The challenge in the present writ petition is to the order passed by the appellate Court in the miscellaneous civil appeal preferred by the petitioners thereby dismissing the same and confirming the order passed by the trial Court granting injunction in favour of the present respondents.

The respondents are the original plaintiffs, who have filed a suit for partition and separate possession of an agricultural field admeasuring 2 hectares 46 ares. It is the case of the respondents that though the suit property was joint ancestral property, the same was sold by the petitioner no.1 in favour of petitioner no.2 on 21/06/2014 and this alienation was contrary to law. Hence, the aforesaid suit for partition and cancellation of aforesaid sale-deed came to be

filed. While considering the application for temporary injunction, the trial Court on the basis of report of the Talathi dated 30/01/2015 proceeded to allow the application for temporary injunction in terms of prayers (a) to (d) of the application. During pendency of the appeal preferred by the petitioners, the property in question was again inspected on 26/08/2015. The Talathi noted the possession of the petitioner no.2 therein. The appellate Court, however, dismissed the appeal preferred by the petitioners by holding that the discretion exercised by the trial Court did not call for any interference. Being aggrieved, the petitioners have challenged the aforesaid order.

Shri R.R. Srivastava, learned Counsel for the petitioners submitted that as per the earlier report of Talathi dated 30/01/2015, the petitioner no.1, who is the vendor of petitioner no.2 along with respondent no.2 herein were found in possession. As the name of the petitioner no.2 was not shown in the possession column, a fresh application came to be moved after the trial Court decided the application for temporary injunction. In this subsequent inspection, the petitioner no.2 was found in possession. He submitted that even the respondent no.2 had sworn an affidavit on 28/07/2015 confirming the possession of the petitioner no.2.

He, therefore, submitted that considering the aforesaid aspect and the fact that this Court by an order dated 28/12/2015 had directed the parties to maintain *status quo*, the possession of the petitioner no.2 deserves to be protected.

Shri Mir Nagman Ali, learned Counsel for the respondents supported the impugned order. According to him, in the initial inspection, the respondent no.2 was found in possession of the suit land along with his father. It was not open for the petitioner no.2 to have sought a fresh inspection after the trial Court had held in favour of the respondents. He, therefore, submitted that the second inspection dated 26/08/2015 was of no consequence. According to him, the petitioner no.1 had no right whatsoever to execute the sale-deed dated 23/06/2014 especially when the nature of the property was joint. He relied upon the decision of the Hon'ble Supreme Court in Gajara Vishnu Gosavi vs. Prakash Nanasaheb Kamble & Ors. - 2009(6) ALL MR 983 as well as the judgment of the Division Bench in M/s. Chheda Housing Development Corporation vs. Bibijan Shaikh Farid & Ors. - 2007(3) ALL MR 780 and submitted that unless the property was partitioned, the possession of such property could not have been delivered to a third party. He then submitted that the discretion exercised by both the Courts below in granting

injunction did not deserve to be interfered with. In that regard, he placed reliance upon the decisions in Vidyadhar Sitaram Mokal and others vs. Barkatullah Allhasan Shaikh and others – 2013(4) Mh.L.J. 505 and Vishnu Keshav Sanap vs. Bhagwan Vithoba Ingale & Ors. - 2011(5) ALL MR 623 as well as Baburao s/o Namdeo Nalwade since (D) thr. L.Rs. and others vs. Tukaram s/o Keshav Nalwade since (D) thr. L.Rs. and others – 2015(2) Mh.L.J. 912.

I have heard the respective Counsel for the parties at length and perused the documents on record. The validity of sale-deed dated 23/06/2014 executed by petitioner no.1 in favour of the petitioner no.2 is under challenge. The nature of suit property as to whether the same is joint family property or self-acquired property is a matter to be decided at the trial. In the inspection dated 30/01/2015, the petitioner no.1 and the respondent no.2 were found in possession. During pendency of the appeal, the respondent no.2 submitted his affidavit on record stating therein that the possession of the suit property was with the petitioner no.2. In the subsequent inspection dated 26/08/2015, the possession of the petitioner no.2 has been shown.

From the aforesaid material on record, it can be seen that the name of the respondent no.1 is not found in

either of the inspections carried out. The place of residence of the plaintiff no.1 is of village Banpuri, while the suit property is situated at village Bori. Though these reports of the revenue authorities have not attained finality, a *prima facie* view is required to be taken on the basis of the material on record.

Considering the aspect that presently there is a sale-deed dated 23/06/2014 standing in favour of the petitioner no.2 coupled with the affidavit executed by respondent no.2 - plaintiff no.2 in favour of the petitioner no.2 and the fact that this Court had directed the parties to maintain status quo on 28/10/2015, I am inclined to continue this direction to the parties to maintain *status quo* during pendency of the suit. The decisions relied upon by the learned Counsel for the respondents would have bearing when the suit is decided on merits. At this *prima facie* stage, it is not necessary to adjudicate upon the respective rights of the parties as such adjudication would require recoding of evidence.

By clarifying that the observations made in the present order are merely for the purposes of deciding the application for temporary injunction with a further direction to the petitioner no.2 not to alienate or create third party

rights in the suit property, the proceedings in Special Civil Suit No.938/2014 are expedited. The parties are directed to maintain *status quo* during pendency of the aforesaid suit as per order dated 28/10/2015. The trial court shall decide the suit by the end of April, 2017.

The writ petition stands disposed of in aforesaid terms with no order as to costs.

JUDGE

*sdw

C E R T I F I C A T E

I certify that this order uploaded is a true and correct copy of the original signed order.

Uploaded by: S.D. Waghmare
P.A. to the Hon'ble Judge.

Uploaded on : 28/07/2016